UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

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(Including Court Decisions)

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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of Agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent Decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.),* the Agricultural Marketing Agreement Act of 1937 (U.S.C. § 601 *et seq.),* Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.),* the Animal Welfare Act (7 U.S.C. § 2131 *et seq.),* the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.),* the Grain Standards Act (7 U.S.C. § 1821 *et seq.),* the Horse Protection Act (15 U.S.C. § 1821 *et seq.),* the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 *et seq.),* the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499a *et seq.),* the Plant Quarantine Act (7 U.S.C. § 151 *et seq.),* the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.),* and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. §151 *et seq.).*

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

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DEFIANCE MILK PRODUCTS COMPANY, A DIVISION OF DIEHL, INC., Plaintiff-Appellant v. RICHARD LYNG, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant-Appellee.
No. 87-3045.
Decided September 27, 1988.

Temporary amendment to milk marketing order was in accordance with law - Emergency situation necessitated adoption without recommended decision and opportunity to comment.

Temporary amendment to marketing order regulating the handling of milk was in accordance with law and supported by substantial evidence of a temporary glut of milk in the marketplace requiring action to alleviate the burden on milk handlers. Amendment did not violate regulatory scheme as absolute equality among handlers and producers is not required in milk marketing orders A handler's unhappiness with a regulation is inevitable given the complexities of the market. Emergency conditions justified the adoption of the amendment without the issuance of a recommended decision and the opportunity to file exceptions.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Before: MERRITT, KENNEDY and KRUPANSKY, Circuit Judges.

MERRITT, Circuit Judge. The issue in this case is the validity of a temporary amendment to a Department of Agriculture order regulating the marketing of milk in the Ohio Valley area, 7 C.F.R. part 1033 (1987), pursuant to subsection 8c of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 608c (1982). The District Court granted the Secretary's motion for summary judgment. We hold that the amendment, though questionable, was supported by substantial evidence of a temporary glut of milk in the marketplace requiring action to alleviate the burden on certain milk handlers and is not in violation of the regulatory scheme created by Congress; therefore, we affirm the judgment of the District Court.

I. Regulatory Background: Milk Economics[1]

This case requires us to "traverse the labyrinth of the federal marketing regulation provisions." *Zuber v. Allen*, 396 U.S. 168, 172 (1 (footnote omitted). In order to review the administrative action pres before us, a brief description of the history and mechanics of the federal regulatory program is needed.

> [T]he "milk problem" is exquisitely complicated. The city dweller o poet who regards the cow as a symbol of bucolic serenity is indee naive. From the udders of that placid animal flows a bland liquid indispensable to human health but often provoking as much human strife and nastiness as strong alcoholic beverages.[2]

Two conditions peculiar to the milk industry led to the establishment federally regulated milk price structure. The first is that raw milk essentially two end uses: as fluid milk and as an ingredient in manufactu dairy products such as butter or cheese. The second condition is seasonal Dairy cows produce more milk in the spring "flush" season than they during the fall and winter.

The confluence of these two conditions created problems which Congr decided necessitated regulation. Raw milk to be used as fluid milk comma a higher price than milk to be used in manufactured products. Fluid milk highly perishable, and if it cannot be marketed quickly it must manufactured into other dairy products. The milk used to produ manufactured products is referred to as "surplus." Fluid milk commands higher price than surplus milk, in part because fluid milk from a particul geographic area is generally marketed in that area, while manufactur products from a particular geographic area must compete directly with oth manufactured products from other areas, which often are marketed mo cheaply due to factors such as economies of scale and production costs relate to geography.

As a result of the natural two-price structure, dairy farmers, abse regulation, obviously would prefer to sell milk exclusively for fluid us However, the seasonal nature of the dairy industry prevents this. A dairy her sufficient to produce a supply of fluid milk adequate for consumer needs i the fall and winter will produce a glut in the spring.

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[1] *See generally United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 542-50 (1939); *Zuber v Allen*, 396 U.S. 168, 172-79 (1969); *Block v. Community Nutrition Institute*, 467 U.S. 340, 341-4 (1984); *Smyser v. Block*, 760 F.2d 514, 515-17 (3d Cir. 1985). *See also* Kessel, *Economic Effect of Federal Regulation of Milk Markets*, 10 J. L. & Econ. 51 (1967); Brooks, *The Pricing of Mil Under Federal Marketing Orders*, 26 Geo. Wash. L. Rev. 181 (1958). Note, *Milk Orders: Selecte Topics*, 31 S.D.L. Rev. 406 (1986).

[2] *Queensboro Farm Products, Inc. v. Wickard*, 173 F.2d 969, 974 (2d Cir. 1943) (Frank, J.).

Before regulation, milk distributors ("handlers") would obtain bargains during glut periods, engendering cutthroat competition among dairy farmers ("producers"). To maintain income, farmers would increase production even more. In the 1920's producers restored equilibrium to the market by forming cooperatives. Cooperatives pooled their milk supplies and refused to deal with handlers except on a collective basis. This arrangement held until the drop in commodity prices during the Depression destroyed the market equilibrium. Congress responded by passing the Agricultural Adjustment Act of 1933, which gave the Department of Agriculture broad authority to regulate the marketing of commodities. After the Supreme Court's decision in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which disapproved a similarly broad delegation of power under the National Industrial Recovery Act, the agriculture act was amended by the Agricultural Adjustment Act of 1935, which authorized the substitution of a system of marketing orders for the system of agreements and licenses authorized by the 1933 Act.

The 1935 Act was amended by the Agricultural Marketing Agreement Act of 1937, codified as amended at 7 U.S.C. § 608c, which created the milk regulatory scheme that is in effect today. This act separated milk regulation from the regulation of other agricultural commodities. The Act seeks to raise the general level of producer prices by authorizing the Secretary of Agriculture, after notice and opportunity for hearing, to issue orders that regulate milk prices in given geographical market areas, thereby ensuring that the benefits and burdens of a particular market are shared by all producers serving the market.

Within a marketing area (an "order"), milk is classified according to its end use. Generally, there are either two or three classifications in an order. In Order 33, the marketing area in this case, there are three classifications. Fluid milk is Class I, while manufactured products are Class II and Class III.

All wholesalers of milk, so-called "handlers," pay a uniform minimum price for each use class, subject only to adjustment for "(1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers." 7 U.S.C. § 608c(5)(A).

On the other hand, dairymen or "producers" of milk who supply the handlers in a market receive a uniform "blend" price for their milk, regardless of its end use. The blend price is roughly the weighted average uniform price of all milk sold under the order during a given period. Competition among farmers to sell as much of their milk as possible for fluid use is thus eliminated. 7 U.S.C. § 608c(5)(C). *See, e.g.*, 7 C.F.R. 1033.72 (payments to producers in Order 33).

Individual handlers are unlikely to utilize milk in exactly the same proportion as the market as a whole. Therefore, handlers whose total class utilization value of the milk they use exceeds the uniform blend price value of the milk must make payments into a "producer-settlement" fund, while handlers whose class utilization value of their milk is less than the uniform blend price value of the milk receive payments out of the fund. The cumulative effect is supposed to be that producers in a market area receive a uniform price for the milk they sell, while handlers pay for the actual use value of the milk they purchase.

II. The Amendment to Order 33

Appellant Defiance Milk Products Company ("Defiance"), a handler, is not a general wholesaler of milk but operates a milk processing plant at Defiance, Ohio, which manufactures evaporated whole milk and condensed milk, both of which are priced as Class III milk. At all times relevant to this case, Defiance was a regulated "pool supply" plant under Order 33, which means that it would give up milk to the fluid market when there was a shortage. As a pool supply plant, Defiance gave up for Class I use 50% or more of its milk supply during designated months, generally September through February. Defiance bought milk from independent producers and from producers who were members of cooperative associations, primarily Milk Marketing, Inc. (MMI).

In early 1983, MMI, which represented about 75% of the producers in Order 33, recommended an amendment of the order which would, on a temporary basis, reduce by 40 cents per hundredweight the price that handlers had to pay for producer milk used to manufacture some Class III products: namely, butter, nonfat dry milk powder, and cheese.[3] All three of these products were classified as Class III, but MMI's proposal would have created a new Class III(A) limited to these three products. MMI stated that a recent surge in the volume of milk in the market, coupled with a decline in the demand for Class I milk, made the temporary amendment necessary. As a "balancer of supply," it would take the glut of milk on the market and would lose money if its selling price were not reduced so that it could peddle its excess milk to manufacturers of butter, dry milk powder, and cheese.

The Secretary held a rulemaking proceeding. Defiance urged that any amendment adopted should include a price reduction for all Class III products, rather than only for butter, dry milk, and cheese. Defiance pointed out that the products it manufactures, evaporated and condensed milk, are interchangeable for many uses with dry milk. (In its post-hearing brief at the administrative level, the company modified its position by requesting that only evaporated and condensed milk be added to the product uses to be considered for a price reduction rather than all Class III products. On appeal, Defiance

[3] The proposed amendment also applied to Order 36, the Eastern Ohio-Western Pennsylvania Marketing Area. We review the amendment only as it applies to Defiance.

argues only that evaporated milk should have been included. The reason for this change is that Defiance did not manufacture any condensed milk during the period the amendment was effective, and thus only paid a higher price for milk used to manufacture evaporated milk.)

The Secretary of Agriculture agreed that some price reduction was necessary as a result of the glut of milk in the market. Because of the emergency marketing conditions, an amendment was adopted without the issuance of a recommended decision and the opportunity to file exceptions. *See* Decision on Proposed Amendment to Marketing Agreements and to Orders, 48 Fed. Reg. 22,313 (1983) (amendment codified at 7 C.F.R. 1033.60(h), 7 C.F.R. 1036.60(f)). The amendment, which was effective in June and July 1983, granted pool handlers a $0.40 per hundredweight reduction in their pool obligation for milk used in processing butter, dry milk powder, and cheese. The Secretary stated that the price reduction did not apply to "some storable products such as canned milk and blends of margarine and butter, for which there was no demonstration on the record that handlers incur losses in marketing milk for such uses." 48 Fed. Reg. at 22,316.

In September 1983, acting pursuant to 7 U.S.C. § 608c(15)(A), Defiance filed a petition with the Secretary stating that the amendment was not in accordance with law and praying for either a modification of or exemption from the amendment. The petition requested a refund, with interest, of the extra $0.40 per hundredweight Defiance had paid for producer milk during the period that the amendment was effective.

A hearing on the petition was held before an administrative law judge. On October 15, 1984, the ALJ granted Defiance's petition and ordered a refund of $68,011.44, but did not order the payment of interest.

Both parties appealed to the Departmental Judicial Officer. By a decision and order dated January 24, 1985, the Judicial Officer reversed the decision of the ALJ and dismissed the petition.

Acting pursuant to 7 U.S.C. § 608c(15)(B), Defiance filed a complaint in the District Court for the Northern District of Ohio. The complaint alleged that the amendment is not in accordance with law, is unsupported by substantial record evidence, is arbitrary, capricious and an abuse of discretion, and is not authorized by the Act. After discovery, the case was submitted to the District Court on cross motions for summary judgment. The District Court granted the Secretary's motion and denied Defiance's motion. This appeal followed.

III. Discussion

Our review of the Secretary's decision is limited to whether the decision is in accordance with law and whether the decision is supported by substantial evidence. *See Lehigh Valley Farmers v. Block*, 829 F.2d 409, 412 (3rd Cir.

1987); *Suntex Dairy v. Block*, 666 F.2d 158, 162 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982). The Secretary's decision satisfies both of these standards.

Although the Secretary's opinion is not a model of clarity, the record is clear that emergency marketing conditions existed in Order 33. There is ample evidence in the record to support the Secretary's finding that the volume of milk in the market had surged and the demand for Class I milk had declined. Something had to be done to deal with the surge in surplus milk. The Secretary noted that all of the pool manufacturing plants that manufactured butter, dry milk, and cheese had been operating at close to 100% capacity; this was part of the reason MMI projected losses in handling surplus milk--the pool manufacturing plants could not take on any more milk and the milk had to be transported elsewhere, at MMI's expense. Defiance argues, however, that it had additional capacity to handle surplus milk that the Secretary did not take into account when he limited the amendment to "normal outlets."

The stated purpose of the amendment was "to provide more equitable sharing among all producers on the markets of the cost of disposing of surplus milk." 48 Fed. Reg. at 22,315. The Secretary chose to achieve this purpose lowering the minimum price for the three products that he termed "normal lets" for surplus milk. He stated that

> it would be appropriate to provide price relief under the orders to cover the actual losses incurred. Also, the price reduction should be on marketings of milk in only those uses that proponent stated are the normal outlets for seasonal surplus milk on these markets, namely butter, nonfat dry milk, and cheese (except cottage cheese and cottage cheese curd) plants.

Fed. Reg. at 22,316. Put another way the Secretary's decision focused "on e measurable amounts by which the value of surplus milk going to certain es would be depressed." Decision and Order of Department Judicial Officer 56. Evaporated milk was not included because "there was no demonstration the record that handlers incur losses in marketing milk for such uses." 48 d. Reg. at 22,316.

Despite Defiance's argument that it had excess "capacity" and would have ught milk at the reduced price, the record indicates only that Defiance ild have "considered" buying more Order 33 milk if the price were lower. pacity" is not the test used by the Secretary in balancing supply and nand. The test seems to be whether a handler was committed to take milk he market. The opportunistic and contingent nature of Defiance's interest purchasing milk does not indicate that evaporated milk manufacturers ld in fact purchase a significant amount of milk or that they were a nary outlet for a glut of surplus milk. The Secretary found that handlers nilk used to manufacture butter, powdered milk, and cheese would incur ss es precisely because they were committed to buying surplus milk g rdless of the price.

Absolute equality of treatment among handlers and producers is not required in milk marketing orders. The complexities of the market and the competing interests of market participants make it inevitable that someone will be unhappy with any regulation. As long as the regulation is based on substantial evidence, we will not disturb the Secretary's decision.

> After all, the Secretary must look at the area with a wide and comprehensive perspective. He has before him the entire output of milk in the area, and he must search for the best ways and means for its disposition. Aware of the annual consumption and distribution of fluid milk, he must arrange to channel the residue into outlets the most advantageous to the producer and consumer. He fashions his order accordingly. Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. . . . If the Secretary cannot "produce complete equality, for the variables are too numerous", he fulfills his role when he makes a reasoned Order.

United States v. Mills, 315 F.2d 828, 838 (4th Cir.), *cert. denied*, 375 U.S. 819 (1963) (citations omitted). In this case, the Secretary attempted to provide relief for emergency conditions by adopting the amendment. Even if our hindsight led us to a different conclusion about the proper scope of the amendment, we would not disturb the Secretary's conclusions because they are based on substantial evidence in the record.

Defiance also argues that the amendment violates the price uniformity requirement of § 608c(5)(A). The amendment that was originally proposed by MMI would have created a new Class III(A), and prices within that class would have been uniform. The amendment adopted by the Secretary, however, did not explicitly create a new class. Instead, the amendment merely modified the procedure by which the minimum price for some, but not all, of the products within Class III was computed. Thus, Defiance argues, the prices within Class III were not uniform as to each other and the amendment was unlawful.

The Secretary argues that the effect of the amendment was the creation of a new class and that to argue that price uniformity has been violated is "dead wrong" and a "meritless and lackluster elevation of form over substance." Gov't Brief at 36. Although we agree with the Secretary that uniformity was not violated in this particular case, we think that Defiance's argument is neither "meritless" nor "lackluster." The Secretary's argument seeks to augment his powers beyond those contemplated by the Act and misperceives the limited extent of his administrative powers under the Act. It insists on judicial deference to administrative discretion where deference is not due. The argument apparently is that because the Secretary could have

created a new Class III(A), he could amend the regulations in any way that had the same effect on pricing. However, "[t]he statute before us does not contain a mandate phrased in broad and permissive terms." *Zuber v. Allen*, 396 U.S. at 183. In fact, the "very purpose" of the Act

> was to avoid the infirmity of overbroad delegation and to set forth with particularity the details for a comprehensive regulatory scheme. . . . It is clear that Congress was not conferring untrammeled discretion on the Secretary and authorizing him to proceed in a vacuum. This was the very evil condemned by the courts that the 1935 amendments sought to eradicate.

Id. at 185 (footnote omitted).

Despite the narrow discretion afforded the Secretary, we hold that the amendment was permissible under the emergency circumstances of this case. The transcript of the rulemaking proceeding and the published decision that accompanied the amendment indicate that all of the parties involved contemplated the creation of a new class more accurately reflecting the fluctuations in supply in the marketplace. The Department Judicial Officer inferred that the amendment was written as a temporary reduction in the handlers' net pool obligations for Class III simply because that course required the amendment of only one rather than several sections of the regulations; he inferred that the Secretary wanted to avoid engaging in extensive and costly reprogramming of the Department's computers in order to implement a price change that would only be effective for two months. This inference may be correct, although there is nothing in the record to guide us on the question. What is clear from the record, though, is that all of the parties at the hearing contemplated the creation of a new, temporary class, and the Secretary's action had that effect. If the amendment had been permanent rather than of a mere two months' duration, the explicit creation of a new class would have been appropriate. Under the circumstances of this case, however, we will not hold that price uniformity was violated simply because the Secretary chose the most convenient or the least disruptive method to effect a temporary change.

The efficacy of government regulation of milk markets has been criticized. *See* Ippolito & Masson, *The Social Cost of Government Regulation of Milk*, 21 J. L. & Econ. 33, 60-61 (1978) (estimating annual cost of regulation at $60 million; expressing doubt as to continuing validity of alleged benefits of regulation). As an Article III court, however, we sit in judgment of a regulation's lawfulness, not its economic efficiency. No question is raised concerning the validity of the regulatory scheme administered by the Secretary. *See United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939). We do note, however, that the Secretary's action in this case was an attempt to make the regulatory structure responsive to the vicissitudes of the marketplace. We are dealing with agency actions taken in response to unusual

market conditions. If a system of market regulation is going to exist, we should not discourage the Secretary's reasonable attempt to make market demand catch up with supply through lower prices, although Defiance may be correct that it would have been wiser to lower prices more generally.

We hold that the amendment to Order 33 was supported by substantial evidence and was in accordance with law. Therefore, the judgment of the District Court is AFFIRMED.

In re: LARRY CONLEY.
A.Q. Docket No. 88-8.
Default Decision and Order filed August 3, 1988.

Interstate movement of cattle without owner's statement, and certificate and entry permit - Failure to respond to allegations in complaint.

Patrice Harps, for Complainant.
Respondent, pro se.
Default Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111-120) by a complaint issued by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated sections 71.18(a)(1)(iii) and 78.9(d)(3)(iii) of the regulations (9 C.F.R. §§ 71.18(a)(1)(iii) and 78.9(d)(3)(iii)) issued under the Act. A copy of the complaint and the Rules of Practice governing proceedings under the Act were served by certified mail on respondent by the Hearing Clerk on March 30, 1988.

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, that failure to deny, otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of the allegations in the complaint and waiver of hearing. The letter of service also advised respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver of an oral hearing. Respondent has failed to deny, respond or plead specifically to any allegations in the complaint and has failed to request an oral hearing.

Respondent's failure to deny or plead specifically to any allegation in the complaint constitutes an admission of the allegations in the complaint pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Larry Conley, herein referred to as respondent, is an individual whose address is Rt. 1, Cooper, Texas 75432.

2. On or about June 9, 1987, respondent moved interstate 33 cows from Berryville, Arkansas to Sulphur Springs, Texas, in violation of section 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.9(d)(3)(iii)), because the cows were not accompanied by a certificate, as required.

3. On or about June 9, 1987, respondent moved interstate 33 cows from Berryville, Arkansas to Sulphur Springs, Texas, in violation of section 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.9(d)(3)(iii)), because the cows were not accompanied by a "Permit for Entry", as required.

4. On or about June 9, 1987, respondent moved interstate 33 cows from Berryville, Arkansas to Sulphur Springs, Texas, in violation of section 71.18(a)(1)(iii) of the regulations (9 C.F.R. § 71.18(a)(1)(iii)), because the cows were unaccompanied by an owner's statement or other document containing prescribed information, as required.

Conclusions

Respondent has failed to respond in the required manner to the allegations in the complaint. By reason of the Findings of Fact set forth above, respondent has violated the Act and the regulations issued under the Act. Therefore, the following order is issued.

Order

Respondent Larry Conley is hereby assessed a civil penalty of $1,500.00, which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be forwarded within thirty (30) days from the effective date of this Order to:

USDA, APHIS Field Servicing Office
Accounting Section, Butler Square West
5th Floor, 100 North 6th Street
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 88-8.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless respondent appeals to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final September 14, 1988.--Editor.]

In re: WAYNE GOODALL.
A.Q. Docket No. 276.
Decision and Order filed August 10, 1988.

Interstate movement of cattle without owner's statement, certificate and entry permit - Failure to file an answer.

Joe Pembroke, for Complainant.
Respondent, pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

On July 12, 1988, a prehearing telephone conference was conducted at 3:00 p.m., E.D.T. Complainant was represented by Attorney Joseph Pembroke. Respondent was represented by himself, Wayne Goodall.

During the telephone conference, respondent did not deny violating the Act or regulations alleged in the complaint issued in this case, but requested a reduction in the amount of the civil penalty requested in the complaint. After discussion, it was determined that an order should be entered, accessing the original $1,500.00 civil penalty requested in the complaint, but holding $750.00 of the civil penalty in abeyance provided respondent pay $100 within 30 days of the Decision and Order, and pay the remaining balance of $650.00 within a year from July 12, 1988.

Findings of Fact

1. Wayne Goodall, herein referred to as the respondent, is an individual whose address is Rural Route, Hollister, Missouri 65672.

2. On or about June 17, 1985, respondent shipped interstate at least 15 cows from Hollister, Missouri, to a farm at Riverton, Nebraska, owned by Mr. Ralph Sindt, in violation of section 78.9(c)(3)(iii) of the regulations (9 C.F.R. § 78.9(c)(3)(iii)), because the cows were not accompanied by a certificate, as required.

3. On or about July 17, 1985, respondent shipped interstate at least 15 cows from Hollister, Missouri, to a farm in Riverton, Nebraska, owned by Mr. Ralph Sindt, in violation of section 78.9(c)(3)(iii) of the regulations (9 C.F.R. § 78.9(c)(3)(iii)), because the cows were not accompanied by a "Permit of Entry" as required.

4. On or about June 17, 1985, respondent shipped interstate at least 15 cows, that were over two years of age, from Hollister, Missouri, to a farm at Riverton, Nebraska, owned by Mr. Ralph Sindt, in violation of section 71.18 of the regulations (9 C.F.R. § 71.18), because the cows were moved interstate unaccompanied by an owner's statement or other document containing prescribed information as required.

Conclusions

;pondent has failed to file any answer to any of the allegations in
int. The consequences of such a failure were explained to the
in the complaint and in the letter of service that accompanied it.
ice, respondent has admitted all of the material allegations of fact
plaint.
;on of the Findings of Fact set forth above, the respondent has
Act and regulations promulgated thereunder. The following order
issued.

Order

dent, Wayne Goodall is hereby assessed a civil penalty of one
ive hundred dollars ($1,500.00) of which $750.00 will be held in
rovided respondent pay $100.00 within 30 days of this order and the
$650.00 balance on or before July 12, 1988.
pondent shall pay the civil penalty in the form of certified checks
rders made payable to:

Treasurer of the United States
United States Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office
Accounting Section
Butler Square West - 5th Floor
Minneapolis, Minnesota 55403

der shall be final and effective 35 days after service of this Decision
upon respondent, unless there is an appeal to the Judicial Officer
section 1.145 of the Rules of Practice applicable to this proceeding
1.145).
ecision and order became final September 26, 1988.--Editor.]

In re: DR. MELTON G. SOWELL, DVM.
V.A. Docket No. 88-03.
Default Decision and Order filed August 12, 1988.

Failure to inspect animals yet certifying inspection had taken place -- Failure to respond to allegations.

Albert Oakley, for Complainant.
Respondent, pro se.
Default Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the regulations governing the Accreditation of Veterinarians and Suspension or Revocation of Such Accreditation (9 C.F.R. §§ 160.1 *et seq.*), hereinafter referred to as the regulations. The complaint alleged that respondent violated section 161.3 of the regulations (9 C.F.R. § 161.3), Standards for Accredited Veterinarians, issued under the Act. A copy of the complaint and the rules of practice governing proceedings under the Act were served by certified mail on respondent by the Hearing Clerk on April 26, 1988.

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, that failure to deny or otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of the allegations in the complaint and a waiver of hearing. The letter of service also advised respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver of an oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and has failed to request an oral hearing.

Respondent's failure to file an answer within the time prescribed by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) constitutes an admission of the allegations of the complaint pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §.1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Dr. Melton G. Sowell, respondent, is an individual whose mailing address is Buena Vista Veterinary Clinic, 647 South Horizon Boulevard, El Paso, Texas 79927.

2. Respondent is now, and at all times material herein was, a Doctor of Veterinary Medicine in the State of Texas.

3. Respondent was an Accredited Veterinarian in the State of Texas, under the provisions of the Regulations (9 C.F.R. §§ 160.1 *et seq.*), at all times material herein.

4. Respondent, on or about May 27, 1986, issued United States Origin Health Certificate Number B052506, certifying that he had inspected 310 sheep and found them to be free of communicable disease, when, in fact, the respondent did not so inspect said sheep.

5. Respondent, on or about May 27, 1986, issued United States Origin Health Certificate Number B052507, certifying that he had inspected 505 goats and found them to be free of communicable disease, when, in fact, the respondent did not so inspect said goats.

6. Respondent, on or about May 27, 1986, issued United States Origin Health Certificate Number B052508, certifying that he had inspected 370 sheep and found them to be free of communicable disease, when, in fact, the respondent did not so inspect said sheep.

7. Respondent, on or about May 15, 1986, issued United States Origin Health Certificate Number B052505, dated May 13, 1986, certifying that he had reinspected 40 cattle on May 15, 1986, and found them to have a negative tuberculin reading, when, in fact, the respondent did not so reinspect said cattle.

8. By reason of the facts alleged in paragraphs 1-7 hereinabove, respondent has violated paragraphs (a), (b), (d), (h), and (j) of the Standards (9 C.F.R. § 161.3(a), (b), (d), (h), and (j); formerly 9 C.F.R. § 161.2(a), (b), (d), (h), and (j)).

Conclusions

Respondent has failed to respond in the required manner to the allegations in the complaint. By reason of the Findings of Fact set forth above, respondent has violated the regulations and, specifically, the Standards for Accredited Veterinarians, 9 C.F.R. § 161.3.

Therefore, the following order is issued.

Order

The Veterinary Accreditation of the respondent, Dr. Melton G. Sowell, D.V.M., is hereby revoked.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon the respondent, unless the respondent shall appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final September 26, 1988--Editor.]

In re: MICHAEL W. HONOSHOFSKY and DIANE E. HONOSHOFSKY, d/b/a MI-DEE ACRES.
AWA Docket No. 88-6.
Decision and Order filed August 15, 1988.

Operation as a dealer after expiration of license -- Failure to file an answer.

Robert Ertman, for Complainant.
Respondent, pro se.
Decision and Order issued by Edwin Bernstein, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) (hereinafter referred to as the Act), instituted by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. §§ 1.130-1.151) were served upon respondents by the Hearing Clerk by certified mail. Respondents were informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Michael W. Honoshofsky and Diane E. Honoshofsky, d/b/a Mi-Dee Acres, hereinafter referred to as respondents, are individuals residing at 40330 Webster Road, LaGrange, Ohio 44050.

2. The respondents, at all times material herein, were doing business as dealers as defined by the Act and the regulations issued pursuant to the Act.

3. Respondents were licensed under the Act as a class "B" dealer until February 3, 1986, when their license was terminated because it was not renewed. Respondents were notified by letter dated October 31, 1985, that their license would expire on December 3, 1985, unless renewed. Respondents were notified by letter dated December 3, 1985, that their license renewal application had not been received, and that their license would expire

at the end of a 60-day grace period unless renewed. Respondents were also warned that they would be in violation of the Act and the regulations if they continued to operate as a dealer after the expiration of their license. Finally, respondents were notified by letter dated February 3, 1986, that their license had expired. They were again warned that they would be in violation of the Act and regulations if they continued to operate as a dealer without a valid license.

4. On or about each of the dates listed below, respondents willfully violated section 4 of the Act (7 U.S.C. § 2134), and section 2.1 of the regulations (9 C.F.R. § 2.1) by selling animals (guinea pigs, hamsters, or rabbits) at wholesale, without applying for and maintaining a license in accordance with the Act and the regulations. Each such sale constitutes a separate violation:

April 8 and 23, 1986;
May 5, 6, and 28, 1986;
June 3, 17, and 27, 1986;
July 7, 14, 21, and 28, 1986;
August 26, 1986;
September 8, 16, and 30, 1986;
October 9, and 21, 1986;
November 1, 11, and 21, 1986;
December 1, 11, 18, and 29, 1986;
January 5, 15, and 23, 1987;
February 3, 10, 15, and 27, 1987;
March 7, 1987;
June 9, 1987;
July 27, 1987;
August 5, and 18, 1987;
September 11, 18, and 24, 1987;
October 5, 13, 21, and 26, 1987;
November 2, 9, and 16, 1987;
December 14, and 28, 1987.

5. Respondents' gross receipts from the sale of animals (guinea pigs, hamsters, and rabbits) exceeded $500 in 1986 (following the expiration of their license), and in 1987.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondents have willfully violated section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations issued pursuant to the Act (9 C.F.R. § 2.1).

Order

1. Respondents shall cease and desist from violating the Animal Welfare Act, as amended, and the regulations and standards issued thereunder, and in particular shall cease and desist from engaging in business in any capacity for which a license is required under the Animal Welfare Act without having and maintaining a license as required by the Act and the regulations issued thereunder.

2. Respondents are assessed a civil penalty of $20,000.

The provisions of this order shall become effective on the first day after service of this decision on the respondents.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.142, 1.145).

Copies of this decision shall be served upon the parties.

[This decision and order became final September 29, 1988.--Editor.]

In re: JOHN and BARBARA SHULTZ.
AWA Docket No. 88-14.
Order filed September 20, 1988.

Robert Ertman, for Complainant.
Respondent, pro se.
Order issued by Paul Kane, Administrative Law Judge.

ORDER

Based upon the motion filed by complainant's counsel on August 31, 1988, and for good cause shown, it is ordered that the complaint be and hereby is, dismissed, without prejudice.

Court Decisions

GARY CHASTAIN and JIM LEWIS, Petitioners v. UNITED STATES DEPARTMENT OF AGRICULTURE, Respondent.
No. 88-1613.
Filed September 28, 1988.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Before ARNOLD, FAGG, and WOLLMAN, Circuit Judges.

PER CURIAM.

PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE

Gary Chastain and Jim Lewis seek review of an order of the United States Department of Agriculture (USDA) imposing sanctions on both men for violations of the Packers and Stockyards Act (PSA), 7 U.S.C. §§ 181-229. We affirm the decision of the USDA and deny the petition for review.

Chastain and Lewis operate C&L Stockyards (C&L) in Maysville, Arkansas. C&L purchases cattle on the basis of weight. In response to complaints by a third party, representatives of the USDA conducted an investigation of C&L for suspected short-weighing of purchased cattle. The investigation consisted of weighing the same ten head of cattle before and after the cattle were sold to C&L for an amount based on their weight as determined by C&L. These weighings showed the weights recorded by C&L were lower than the USDA determinations both before and after sale of the cattle.

The USDA instituted disciplinary proceedings against Chastain and Lewis under the PSA, asserting violations of 7 U.S.C. § 213(a) (engaging in deceptive practices) and § 221 (failure to keep proper accounts and records). At an evidentiary hearing before an administrative law judge (ALJ), Chastain and Lewis testified that availability of feed and water after the C&L weighing could have accounted for the weight differential. This testimony, however, was contradicted by the USDA investigators. The ALJ discredited the testimony of Chastain and Lewis and concluded they violated the PSA by falsely recording the weight of cattle and by issuing deficient weight tickets. The ALJ issued a cease and desist order, suspended Chastain's PSA registration for three months, prevented Lewis from obtaining a PSA registration for the same period of time, and assessed civil penalties.

Chastain and Lewis sought agency review of the ALJ's decision. The SDA affirmed the ALJ's determination that Chastain and Lewis falsely eighed nine of the ten cattle and prepared deficient weight tickets for their le. The USDA also concluded the sanctions imposed by the ALJ were ıpropriate and adopted the ALJ's order as the final agency decision. On ıpeal from this final decision, Chastain and Lewis challenge the ALJ's edibility determinations and contend the ALJ's decision was "against the ight of the evidence."

We are obliged to uphold the USDA's decision if it is supported by bstantial evidence. *Blackfoot Livestock Comm'n, Co. v. Department of Agric.*, 0 F.2d 916, 920 (9th Cir. 1987); *Farrow v. USDA*, 760 F.2d 211, 213 (8th Cir. 85). Substantial evidence is "'such relevant evidence as a reasonable mind ght accept as adequate to support a conclusion.'" *Universal Camera Corp. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. LRB*, 305 U.S. 197, 229 (1938)). In addition, we will not overturn the agency's credibility findings "unless they are 'inherently incredible or patently unreasonable.'" *Blackfoot Livestock Comm'n, Co.*, 810 F.2d at 921 (quoted citation omitted).

In this case, the owner of the cattle and the investigators at the scene directly contradicted the testimony of Chastain and Lewis, who were both interested parties. After reviewing the record, we conclude the ALJ's credibility determinations do not warrant reversal and that the ALJ's decision is supported by substantial evidence.

Accordingly, we affirm the USDA's decision and deny the petition for review.

In re: ERICSON LIVESTOCK MARKET, INC., et al.
P&S Docket No. D-88-28.
Supplemental Order filed September 28, 1988.

Allan Kahan, for Complainant.
Gerard D. Eftink, Kansas City, Missouri, for Respondents.
Supplemental Order issued by Paul Kane, Administrative Law Judge.

SUPPLEMENTAL ORDER WITH RESPECT TO RESPONDENT JAMES PATTERSON

On May 24, 1988, an order was issued in the above-captioned matter, which, *inter alia*, found respondent to be unfit to engage in business or operate subject to the Act . . . for a period of ninety (90) days and thereafter until he demonstrates that he is in compliance with the bonding requirements under the Act."

Although the ninety (90) days have now elapsed, and respondent Patterson in not properly registered or in compliance with the bonding requirements of the Act, respondent wishes to be employed as an employee of a registrant who is properly bonded. Complainant has no objection to respondent Patterson operating subject to the Act only as an employee of the vendor or purchaser who is properly registered and bonded under the Act. Accordingly,

It is hereby ordered that the order issued on May 24, 1988 is modified to permit respondent Patterson to operate subject to the Act only as an employee of Sutton Livestock Co., New Hartford, Missouri, or another registrant, as long as Sutton Livestock Co. or the registrant is properly registered and bonded under the Act. The order shall remain in full force and effect in all other respects.

In re: ERICSON LIVESTOCK MARKET, INC., et al.
P&S Docket No. D-88-28.
Supplemental Order filed September 28, 1988.

Allan Kahan, for Complainant.
Gerard D. Eftink, Kansas City, Missouri, and Warren R. Arganbright, Valentine, Nebraska, for Respondents.
Supplemental Order issued by Paul Kane, Administrative Law Judge.

SUPPLEMENTAL ORDER WITH RESPECT TO RESPONDENT RONALD E. WILSON

On June 8, 1988, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant "under the Act for a period of ninety (90) days and thereafter until he complies fully with the bonding requirements under the Act and the regulations. When respondent

has complied with such requirements, a supplemental order will be issued in this proceeding terminating the suspension after the ninety (90) day period."

The ninety (90) days will elapse on September 20, 1988. Although respondent Wilson in not properly registered or in compliance with the bonding requirements of the Act, respondent wishes to be employed as an employee of a registrant who is properly bonded. Complainant has no objection to respondent Wilson operating subject to the Act only as an employee of the vendor or purchaser who is properly registered and bonded under the Act. Accordingly,

It is hereby ordered that the order issued on June 8, 1988 is modified to permit respondent Wilson to operate subject to the Act only as an employee of Lovejoy Cattle Company, Ericson, Nebraska, or other registrant, as long as Lovejoy Cattle Company or the other registrant is properly adequately bonded under the Act. The order shall remain in full force and effect in all other respects.

In re: ALLAN D. FRAZIER.
P&S Docket No. D-88-20.
Decision and Order filed July 25, 1988.

Failure to pay -- Failure to file an answer.

Sharlene Lassiter, for Complainant.
Val A. Patarini, Wauchula, Florida, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Allan D. Frazier, doing business as Circle A Cattle Co., hereinafter referred to as the respondent, is an individual whose business mailing address is P.O. Box 491, Zolfo Springs, Florida 33890.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(2) A packer within the meaning of that term as defined in the Act and subject to the provisions of the Act.

2. (a) Respondent, in connection with his operations as a packer subject to the Act, on or about the dates and in the transactions set forth in paragraph II(a) of the Complaint and Notice of Hearing, and in various other transactions, purchased livestock for the purposes of slaughter and issued checks in purported payment therefor which were returned unpaid by the bank upon which they were drawn because respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) On or about the dates and in the transactions set forth in paragraphs II(a) and (b) of the Complaint and Notice of Hearing, and in various other transactions, respondent purchased livestock for the purpose of slaughter and failed to pay, when due, the full purchase price of such livestock.

(c) As of September 1, 1987, there remained unpaid a total of at least $25,000.00 for livestock purchases set forth in paragraphs II(a) and (b) of the Complaint and Notice of Hearing.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

Order

Respondent Allan D. Frazier, doing business as Circle A Cattle Co., his agents, employees, successors and assigns, directly or through any corporate or other device, in connection with his operations as a packer subject to the Act, shall cease and desist from:

1. Issuing checks in payment for livestock or meat without having sufficient funds on deposit and available in the account upon which they are drawn to pay such checks when presented;
2. Failing to pay, when due, for livestock or meat purchased; and
3. Failing to pay for livestock or meat purchased.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent is hereby assessed a civil penalty of Four Thousand Five Hundred Dollars ($4,500.00).

The provisions of this order shall become effective on the first day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This decision and order became final September 8, 1988.--Editor.]

In re: ROBERT McCORNACK and RANDY CROOK.
P&S Docket No. 6775.
Supplemental Order filed September 9, 1988.

Jory Hochberg, for Complainant.
Ted Pasley, Ardmore, Oklahoma, for Respondents.
Supplemental Order issued by Dorothea A. Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On February 20, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondents as registrants under the Act for a period of five years, but which provided that it could be terminated after 180 days upon demonstration that all livestock sellers have been paid in full.

Respondents have served 180 days of the suspension and have demonstrated that all livestock sellers have been paid in full. Accordingly,

It is hereby ordered that the suspension provision of the order issued February 20, 1987, is terminated. The order shall remain in full force and effect in all other respects.

In re: PAUL RODMAN and PAUL DAVID RODMAN.
P&S Docket No. 6607.
Order filed September 22, 1988.

Severe sanction policy -- Claim of bias by Judicial Officer unfounded -- Ignorance of law not mitigating circumstance.

The Judicial Officer denied respondents' petition for reconsideration. Severe sanctions are imposed for serious violations irrespective of hardship to respondents' community, customers or employees. The Judicial Officer's holding that the custodial account regulations are substantive, rather than advisory, did not change the sanction. The criteria for civil penalties in § 312(b) of the Act are irrelevant in determining suspension orders. Respondents' charge that the Judicial Officer seeks to have his former agency (P&SA) always prevail is unfounded. Similar claims of bias have been rejected in a number of decisions. Ignorance of the law is not a

mitigating circumstance. Examples given as to cases decided by the Judicial Officer against P&SA and other Department agencies.

Eric Paul, for Complainant
Gerard D. Eftink, Kansas City, Missouri, for Respondents.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondents' petition for reconsideration is denied for the reasons set forth in the Decision and Order previously filed in this proceeding on May 27, 1988.

Respondents argue that no suspension order should be imposed because of the severe drought condition presently existing, which may cause farmers to sell their livestock. Whether the drought condition will be relevant at the time this order becomes effective, assuming that it is sustained on judicial review, is doubtful. In any event, however, under this Department's settled sanction policy, severe sanctions are imposed for serious or repeated violations irrespective of hardship to respondents' community, customers or employees in order to protect the broader public interest (see the cases cited in Appendix B, note 125). Furthermore, the 35-day suspension order issued in this case is modest, considering the serious nature of respondents' violations, and the much greater length of other suspension orders issued in recent years (see the cases cited in § VI of the Decision and Order in this case).

Respondents' argument as to whether the decision correctly held the regulations to be substantive, rather than advisory, is irrelevant to the sanction since the identical sanction would have been imposed in either event (see § II of the original decision in this case, showing the sanctions imposed in prior custodial account violation cases in which there was no holding that the custodial account regulations were substantive).

Respondents contend (Respondents' Response to Complainant's Reply to Petition for Reconsideration at 3):

> In the present case, the complaint filed against the respondents did not allege misuse; it only alleged shortages in the custodial account. This is not a case where the conduct is *per se* unfair.

Respondents misread the complaint. It expressly alleges misuse of the custodial account in a manner that is *per se* unfair. Specifically, after the complaint recites shortages in the Oklahoma stockyard custodial account, it states (¶ III(c)):

> (c) The shortages described above were caused, in part by respondent Paul Rodman's deposit to the Oklahoma stockyard general account of funds received from the sale of consigned livestock.

Similarly, after the complaint recites shortages in the Chandler stockyard custodial account, it states (¶ IV(c)):

> (c) The shortages described above were caused, in part, by the respondents' deposit to their Chandler stockyard general account of funds received from the sale of consigned livestock.

In other words, the complaint alleges, and the proof shows, that respondents deposited trust funds in their general accounts rather than their custodial accounts. That is *per se* unfair. Moreover, respondents had large shortages at times in both their custodial accounts and their general accounts (so that, with respect to each stockyard, if all checks outstanding in both accounts had been presented for payment on a particular date, there would not have been sufficient money in either account to pay all outstanding checks). Respondents transferred money from their general accounts to their custodial accounts only when it was needed to keep shippers' checks from bouncing. Such misuse of shippers' trust funds was *per se* unfair.

Respondents argue that a civil penalty, rather than a suspension order, should have been imposed. The flexibility as to suspensions provided by the 1976 amendment authorizing civil penalties (§ 312(b) of the Act (7 U.S.C. § 213(b)) is, of course, considered in every case. A civil penalty, rather than a suspension order, was not regarded as appropriate here in view of the serious nature of the violations. Accordingly, *Holiday Food Services, Inc. v. USDA*, 820 F.2d 1103, 1105-06 (9th Cir. 1987), relied on by respondents (Petition for Reconsideration at 13-14), holding that complainant has the burden of introducing evidence regarding the effect of a civil penalty on the violator's ability to continue in business, is irrelevant here, where no civil penalty was imposed.

Respondents argue (Petition for Reconsideration at 14):

> In this case respondents have requested that the case be reopened to consider evidence on this matter [i.e., relating to the statutory criteria for civil penalties in 7 U.S.C. § 213(b)]. The Judicial Officer has refused. This is unfair. We note that when the Judicial Officer wants to reopen a case to consider new evidence to support a severe sanction he has done it *sua sponte*. (i.e., *In re Saylor*.) Why should the JO be able to, on his own, reopen to introduce new evidence into the record when it supports a severe sanction but refuse to allow respondents to reopen to introduce evidence that would support a lower sanction?

As stated above and in § VI of the decision previously filed in this case, the criteria for civil penalties in § 312(b) of the Act (7 U.S.C. § 213(b)) are irrelevant in determining suspension orders. In addition, respondents' reliance on *Saylor* in the quotation immediately above is misplaced. In *Saylor*, the case was not reopened to consider any new evidence *sua sponte* or otherwise, either by myself or the ALJ. After my original decision in Saylor (*In re Saylor*, 41 Agric. Dec. 2187 (1982)) was "remanded to the USDA for further proceedings in accordance with this [the court's] opinion" (*Saylor v. USDA*, 723 F.2d 581, 584 (7th Cir. 1983)), I issued a remand order to the ALJ which states, in its entirety:

> Pursuant to the order filed on December 21, 1983, by the United States Court of Appeals for the Seventh Circuit in *Saylor v. U.S. Department of Agriculture*, No. 83-1314, this case is hereby remanded to Administrative Law Judge William J. Weber for further proceedings, including the reopening of the hearing, if appropriate, in accordance with the opinion of the court.

My remand order in *Saylor* makes no determination as to whether it would be appropriate to reopen the hearing, and it was unnecessary for me to subsequently determine that issue since neither party requested that the hearing be reopened. After I wrote a 547-page decision dealing with the questions raised by the Court of Appeals, Saylor did not again appeal from the 8-month suspension order and $10,000 civil penalty.

Finally, respondents state (Petition for Reconsideration at 2):

> In this case, the Judicial Officer continues his efforts to change the law, case by case, so that his former agency will always prevail.

My relationship with the Packers & Stockyards Administration ended almost 18 years ago, and I have no interest in seeing that its views prevail, unless I believe that they are correct. In addition, since my initial association with the Packers & Stockyards agency (in December of 1962) was as the head of the agency (Director of the Packers & Stockyards Division), I was accustomed at the outset to having my views prevail, rather than those of P&S employees, where there was a difference. (As stated in § I(D) of the Decision and Order in this case, I included one of the custodial account regulatory provisions over the objection of a number of the P&S staff.)

In fact, opposite from respondents' charge, my expertise in Packers & Stockyards Act matters enables me to see errors in the agency's position even when they are not detected by an ALJ. For example, in the *Saylor* case, cited above, I reduced the suspension period from 9 months imposed by the ALJ to 8 months, because I disagreed with the ALJ and the P&S agency that a

particular practice was unfair or deceptive (*In re Saylor*, 41 Agric. Dec. 2187, 2194-95 (1982)).

Similarly, in *In re King Meat Co.*, 40 Agric. Dec. 552, 552-55 (1981); *In re Thorp*, 36 Agric. Dec. 29, 30 (1977); and *In re Hygrade Food Products Corp.*, 35 Agric. Dec. 129, 129-32 (1976), I dismissed complaints filed by P&S, reversing the ALJs' initial decisions holding that violations had occurred.

In *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1810, 1850-51 (1975), I reduced the suspension order imposed by the Chief ALJ from 90 days to 49 days, over the objections of the P&S agency.

In short, there is no substance whatever to respondents' charge that I strive to see that my "former agency will always prevail."

Claims of bias, similar to those made by respondents here, were rejected in *Parchman v. United States*, 852 F.2d 858, 861, 863, 866 (6th Cir. 1988); *Garver v. United States*, 846 F.2d 1029, 1030-31 (6th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3834 (U.S. May 3, 1988) (No. 87-1923); *Mattes v. United States*, 721 F.2d 1125, 1132-33 (7th Cir. 1983); *Central Ark. Auction Sale, Inc. v. Bergland*, 570 F.2d 724, 730-31 (8th Cir.), *cert. denied*, 436 U.S. 957 (1978); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 430 n. 46 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983). However, in the two most recent of these decisions, *Garver* and *Parchman*, both written by Circuit Judge Boggs, the court expresses some concern as to the intemperate tone of the Judicial Officer's language, particularly regarding the Department's sanction policy. The court states in *Garver* (846 F.2d at 1030-31):

> The sanction in this case was among those permitted by the authorizing statute and the departmental regulation, and the statute and regulation themselves are not challenged.
>
> Garver, instead, rests his attack on certain past writings of the Judicial Officer, Donald Campbell. In those writings, which were in earlier decisions officially published in the Agricultural Decisions series,[1] Campbell opined at some length about the usefulness of severe sanctions as a deterrent to future misconduct and cited various advocates of the virtues of punishment in support of his opinion. In his brief on appeal, Garver takes particular offense at Campbell's citations of "Plato, Socrates and Nietzsche" though he does not mention the references by Campbell to possibly more relevant modern writers on criminology such as Gordon Tullock and Isaac Ehrlich. [Footnote omitted.]
>
> . . . .

[1] *E.g. In re Worsley*, 33 Agric. Dec. 1547 (1974).

Even though any or all of our judges may feel that the sanction was too harsh, or that we might have come to a different conclusion, there simply is not evidence, let alone any preponderance of evidence, that this decision was a result of cognizable personal bias. There is no indication in the record that Campbell's decision is based on any information apart from what he learned from his participation in this case and from his years of service as the Department of Agriculture's Judicial Officer. Consequently, there is no evidence of disqualifying bias before us.

It may be sound advice to all judges and judicial officers to be as temperate as possible when rendering decisions. It would, however, be a great disservice to imply that a vigorous expression of views on a subject appropriately before the tribunal can become evidence of judicial bias.

Similarly, in *Parchman*, the court states (852 F.2d at 861, 866):

While we are disturbed by the intemperate tone of parts of the JO's decision and order and have given the charge of biased adjudication the attention that this most serious allegation deserves, we conclude that evidence of disqualifying bias is not present in this record.

. . . .

The stockyard operators also charge that they were deprived of due process because of JO Campbell's "institutional 'bias' . . . that tends to result in the USDA ruling in its favor in these cases, regardless of the people involved," and because of his well-known and strongly held views in favor of severe punishment in order to foster deterrence.

While we recognize that the discretion afforded to the administrative officer under *Butz* is very large, and is here upheld, we do note disturbing instances of what may appear to be a punitive mentality overriding individual considerations.[8] As this court noted in

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[8] For example, in the appendix to his decision in this case, the JO states, "Frequently, I infer that certain conduct was intentional and done with knowledge of unlawfulness (for the benefit of reviewing judges who may dislike my hardnosed sanction), . . . but the sanction would be the same irrespective of those circumstances."

Garver, a judge's decisions are not biased simply because the judge has a particular view of the law. *Garver*, slip op. at 4-5 (citing *First Nat'l Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1337 (6th Cir. 1987)

(collecting cases)). Also, as was the case in *Garver*, "there is no indication whatsoever that Campbell did not function in a judicial capacity, or that he entertained preconceived notions as to a sanction in this particular case." *Id.* at 4.

Nevertheless, a judge should be careful not to give the impression that a particular view of the law prevents a careful consideration of the law and facts applicable to any given case. When an entire career has been spent in the service of one governmental agency[9], it can be easy for a judge to slip into a stance that may appear to be advocating,

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[9] Campbell obtained his law degree from the George Washington University of Law Center in 1949. He was appointed JO in January 1971 after, in his own words, "having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971)." *See In re Parchman*, 46 A.D. ___, P.&S. No. 6602 slip op. at 1a n.**; 1987 Federal Staff Directory at 906.

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rather than judging, those interests. We do not believe that such a line has been crossed in this case, but we note that it may appear to reasonable observers that there has been a near approach to it.

First, my strong views that severe sanctions should be imposed for serious violations of the Department's regulatory statutes have nothing whatever to do with my career at the United States Department of Agriculture. Rather, they stem from my deep philosophical conviction that laws should be enforced; that where serious consequences result from particular law violations, severe sanctions should be imposed to deter such violations; that lenient sanctions invite disregard for the law; and that one in a judicial or quasi-judicial position fails to perform his or her proper role if personal feelings of sympathy for a violator (e.g., because of the violator's disadvantaged past) are permitted to prevail over the need to impose sanctions that protect society from law violations. If I were to be appointed to a quasi-judicial position at any other agency, or to any judicial position, my first decision and every one thereafter would be governed by the identical views set forth in USDA's sanction policy.[1]

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[1] As stated in note 58 of the *Spencer* decision attached as Appendix B to the original decision herein, my severe sanction policy was mentioned briefly in the *first* decision I issued as Judicial Officer, *viz.*, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971). My sanction views were expanded, and set forth at length in numerous later decisions, one of which (*In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974)), was attached as an appendix to numerous later decisions. Subsequently, the *Worsley* sanction policy was slightly revised and expanded in *In re Spencer* (continued...)

My views as to intentional misconduct, criticized in note 8 of *Parchma* quoted above, are as follows (*Spencer* (attached as Appendix B to the origin decision herein), slip op. at 250-51):

> With respect to "intentional" conduct and knowledge of unlawfulness, it has never been the policy of this Department to limit severe sanctions to the case of intentional violations, or to violations done with knowledge of their unlawfulness. *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). I do not recall any contested case where a respondent has admitted that he knew that he was violating the law. Frequently, I infer that certain conduct was intentional and done with knowledge of unlawfulness (for the benefit of reviewing judges who may dislike my hard-nosed sanction policy), as I did in *Farrow*, but the sanction would be the same irrespective of those circumstances. *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). In *In re Steinberg Bros. Co.*, 43 Agric. Dec. [1878, 1891 and n. 15 (1984)], it is explained that "ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act" because:
>
> > If ignorance of the law were a mitigating circumstance, it would be a disincentive to licensees becoming familiar with the regulatory requirements under the Act, which would tend to thwart the purpose of this remedial legislation.

I adhere to those views, and to the manner in which they are state However, I do not apply those views where the application would not b appropriate because of peculiar circumstances. For example, in *In re Norwic Veal & Beef, Inc.*, 38 Agric. Dec. 214, 222 (1978) (remand order), in reversi an initial decision by an ALJ holding that there had been no violation of th Packers & Stockyards Act, I stated:

> In determining whether a penalty other than a cease and desist order should be imposed, it is, of course, relevant to consider that the Act is susceptible to more than one construction, and complainant's construction of the Act was apparently not published or brought to respondents' attention.

Based on that dicta, the ALJ "concluded that no penalty other than a cea and desist order should issue." *In re Norwich Veal & Beef, Inc.*, 37 Agric. De

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[1](...continued)
Livestock Comm'n Co., 46 Agric. Dec. ____, slip op. at 213-51 (Mar. 19, 1987) (10-year suspension and $30,000 civil penalty), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), and the *Spencer* version of the Department's sanction policy is now included in the Department's disciplinary cases as an appendix.

1202, 1205 (1978). Notwithstanding complainant's appeal (37 Agric. Dec. at 1202), I adopted the ALJ's decision as the final decision in the case (37 Agric. Dec. at 1202).

Since the Department has no appeal to the courts from a decision by the Judicial Officer, the courts do not ordinarily know of the many cases where I decide the issues adverse to the Department, frequently as a result of my expertise, rather than the help received from the briefs of the private litigant. A few examples follow.

In *In re Zartman*, 44 Agric. Dec. 174 (1985), complainant sought a 60-day license suspension order, a $2,000 civil penalty, and a cease and desist order (44 Agric. Dec. at 174). Although I found that violations had occurred, I dismissed the complaint without even a cease and desist order, holding (44 Agric. Dec. at 185-86):

> Complainant instituted a formal complaint against respondent because the violations detected on December 18, 1982, were not eliminated by February 26, 1983. [Footnote omitted.]
>
> However, the violations detected on both dates were of a trivial nature, not posing any serious threat to the well-being of the animals. Respondent has been in the animal auction business for about 32 years, and, except for the trivial violations involved here, respondent had a long, unblemished record of compliance with federal and state requirements applicable to his animal auction. There is nothing in this record that indicates the need for any type of a disciplinary order as to respondent for the trivial violations found here.

In *In re Central Citrus Co.*, 34 Agric. Dec. 1428, 1429-1504 (1975), I ruled that the Department's method of apportioning early maturity navel orange allotments between districts in Arizona and California was unlawful, holding that the Department misconstrued the statutory requirements.

In *In re Prentice*, 46 Agric. Dec. ___ (Aug. 12, 1987), the (now Chief) Administrative Law Judge assessed a civil penalty against an airline pilot for failing to present his luggage for plant quarantine inspection, but I dismissed the complaint, holding (slip op. at 26):

> Notwithstanding the vital importance of complainant's inspection program, until the requirements and prohibitions are set forth in regulations with sufficient clarity to satisfy due process requirements, they cannot be enforced.

Further, I *sua sponte* suggested that fees and expenses may be awarded under the Equal Access to Justice Act, stating (slip op. at 24 n. 8):

> Respondent may be entitled to an award of fees and expenses under the Equal Access to Justice Act (5 U.S.C. § 504 (Supp. III 1985)). I would not have advised respondent of that right except for the fact that the Department's regulations have not been amended since 1982, and

> they erroneously state that the Act is not in effect as to actions instituted after September 30, 1984 (7 C.F.R. § 1.182). In addition, the Department's regulations specifying the statutes under which awards of fees and expenses may be made do not list the Plant Quarantine Act (7 C.F.R. § 1.183(a)), notwithstanding the fact that civil penalties under the Plant Quarantine Act can only be assessed "after notice and an opportunity for an agency hearing on the record" (7 U.S.C. § 163), and, therefore, this proceeding is an "adversary adjudication" (5 U.S.C. § 504(b)(1)(C) (Supp. III 1985)), subject to an award for costs and fees (5 U.S.C. § 504(a)(1) (Supp. III 1985)). Respondent may file an application for fees and expenses under the provisions of 7 C.F.R. § 1.180 *et seq.*, as if they were expressly applicable to this proceeding.[2]

In *In re Utica Packing Co.*, 39 Agric. Dec. 590 (1980), *aff'd*, 511 F. Supp. 655 (E.D. Mich. 1981), *remanded*, 705 F.2d 460 (6th Cir. 1982) (unpublished), *decision on remand*, 44 Agric. Dec. 2724 (1982), *final decision on reconsideration*, 43 Agric. Dec. 373 (1984), *aff'd*, No. 80-72742 (E.D. Mich. Mar. 12, 1985), *reversed and remanded*, 781 F.2d 71 (6th Cir. 1986), I originally withdrew meat inspection from a plant, holding that the conviction of the plant's president and half owner of four felony counts for "corruptly" bribing the supervisory meat inspector to influence inspection at the plant rendered the plant unfit to receive inspection (unless the felon disassociated himself from the plant within 90 days and sold his stock within 1 year). I applied a *per se* approach, holding that although mitigating circumstances must be considered in some cases, they do not have to be considered where the plant's president and half owner is convicted of corruptly bribing the supervisory meat inspector (39 Agric. Dec. at 602-03). The district court affirmed, but the court of appeals remanded the case, holding that the Judicial Officer "erred in refusing to consider the mitigating circumstances" (slip op. at 5).

On remand, I expressed disapproval of the circuit court's decision, and stated that it would not be followed in any case where the felony conviction strikes at the heart of the meat inspection program, except in the Sixth Circuit area (44 Agric. Dec. at 2724-35), stating (44 Agric. Dec. at 2733-35):

> It is the view of the Administrator of the Department's meat inspection program and the Judicial Officer that every person convicted under 18 U.S.C. § 201(b) of corruptly bribing a meat inspector, with the necessary proof of criminal knowledge and purpose, is unfit to receive Federal meat inspection, irrespective of any mitigating circumstances. That conduct alone so strikes at the heart of the meat inspection program as to prove conclusively, without regard to any

[2]The attorney's fee issue in *Prentice* is now pending before me.

mitigating circumstances, that the convicted felon is unfit to receive Federal meat inspection.

Accordingly, in the present case, the Judicial Officer held that respondent was unfit to receive Federal meat inspection because of David Fenster's bribery convictions, irrespective of any mitigating circumstances. The Judicial Officer's decision made it clear that mitigating circumstances are to be considered in the case of felonies not striking at the heart of the meat inspection program. Specifically, the Judicial Officer held (*In re Utica Packing Co.*, 39 Agric. Dec. 590, 603 (1980)):

. . . .

In a thoughtful and well-reasoned decision, the District Court affirmed the Judicial Officer's original decision in this proceeding. *Utica Packing Co. v. Bergland*, 511 F. Supp. 655 (E.D. Mich. 1981).

I believe that the original administrative decision in this case is correct, notwithstanding the reversal by the Court of Appeals. The decision by the Court of Appeals in this case will assure the distribution of unwholesome or adulterated meat in some instances. That is, under the Sixth Circuit's opinion, if there are enough mitigating circumstances, a felon convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector must, nonetheless, be determined to be fit to continue to receive Federal meat inspection. Since the judicial system has not had outstanding success in predicting which criminals will repeat their criminal conduct, we are not likely to have any better batting average in predicting which felons convicted of bribing a meat inspector will not repeat that unlawful conduct, or otherwise attempt to subvert the meat inspection program.

It is true that the Court of Appeals' decision indicates that in the case of a bribery conviction, it is "likely" it will support a determination of unfitness regardless of the mitigating facts present. Specifically, the Court states (slip op. at 5):

> The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present.

Although that suggests that the great majority of persons convicted of bribery under 18 U.S.C. § 201(b) will be found unfit to receive Federal meat inspection regardless of the mitigating facts present it also suggests that some mitigating facts would outweigh a bribery conviction. Otherwise, the Court would not have remanded the present case to consider the mitigating circumstances, notwithstanding Fenster's convictions for bribing the supervisory meat inspector.

> In other words, the Court's statement quoted above was made in this case where the Judicial Officer had held that Fenster's conduct so strikes to the heart of the policies of the Federal Meat Inspection Act that no possible mitigating circumstances could outweigh the felony convictions in determining respondent's fitness to receive Federal inspection. The Court of Appeals did not agree.
>
> The Court's decision must, of course, be followed here--but not in cases in which an appeal does not lie to the Sixth Circuit.
>
> For the reasons set forth above, the decision of the Court of Appeals in this case will not be followed in any case in which an appeal does not lie to the Sixth Circuit. In all cases in which an appeal does not lie to the Sixth Circuit, anyone who is convicted under 18 U.S.C. § 201(b) of the felony of bribing a Federal meat inspector will automatically be found unfit to receive Federal inspection and Federal inspection will be withdrawn indefinitely from the plant (unless it is appropriate, as in the present case, to continue inspection if the convicted felon is completely disassociated from the plant).
>
> However, since other reviewing courts might agree with the Sixth Circuit's decision in the present case, the Administrative Law Judges should in every case receive evidence as to mitigating circumstances and indicate their opinion as to such circumstances.

Notwithstanding my strong disagreement with the circuit court's decision, I concluded on remand that the mitigating circumstances present in *Utica* were as strong as could be expected in any case under the Meat Inspection Act and, therefore, I dismissed the complaint.

The complainant filed a petition to reconsider my decision on remand in *Utica*, and the Secretary of Agriculture removed me as Judicial Officer from that case only, and substituted an administrative secretary to consider the Department's petition for reconsideration. He subsequently reversed my decision. However, the court of appeals reversed and remanded, holding that the Secretary's action violated due process of law.

When I dismissed the complaint on remand in *Utica*, there was no doubt in my mind that the court of appeals would have affirmed my decision on remand, if I had withdrawn inspection after considering the mitigating circumstances. As I later explained in *In re Great American Veal Co.*, 45 Agric. Dec. 1770, 1825 (1986), *aff'd*, No. 86-3998 (D.N.J. Oct. 27, 1987):

> However, although the circuit court expressed "no opinion on either the mitigating circumstances or the merits of the action," one would have to be particularly obtuse not to discern that the circuit court was indicating that in the *Utica* case, it would be *extremely* likely that Fenster's felony convictions alone would support a determination of

unfitness *regardless* of the mitigating facts present. That is, the circuit court said (slip op. at 5):

> Whether a particular conviction is itself sufficient to warrant withdrawal of inspection services depends upon the facts underlying the conviction. The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present. *See Wyszynski Provision Co., Inc. v. Sec. of Agriculture*, 538 F. Supp. 361, 364 (E.D. Pa. 1982).

The circuit court knew that the felonies involved in *Utica* did strike at the heart of the policies of the Federal Meat Inspection Act. In fact, there could be no felony that strikes closer to the heart of the policies of the Federal Meat Inspection Act than the felony of corruptly bribing the supervisory meat inspector assigned to a packing plant for the express purpose of influencing the inspection activities at the plant! Hence the circuit court's opinion strongly suggests (notwithstanding its concluding disclaimer) that in *Utica*, it is extremely likely that Fenster's felony convictions "alone will support a determination of unfitness regardless of the mitigating facts present." Accordingly, when I received the remand order in *Utica*, I was confident that if, after considering the mitigating circumstances, I again held that Utica was unfit to receive inspection, I would be affirmed on appeal.

Nonetheless, since the circuit court's *Utica* decision rejected my *per se* approach *with respect to bribery cases*, and compelled me to consider the mitigating circumstances even in a bribery case, I construed the decision as a holding that at least in some theoretical case, mitigating circumstances would be enough to overcome a bribery conviction, and, since the mitigating circumstances in *Utica* were as strong as could possibly be expected, I dismissed the complaint (44 Agric. Dec. at 2735-43).

In a similar case (*In re Apex Meat Co.*, 44 Agric. Dec. 1855, 1879 (1985), *aff'd*, No. 85-3189 (D.D.C. Sept. 19, 1986), *aff'd per curiam*, No. 86-5627 (D.C. Cir. Sept. 16, 1987)), I withdrew meat inspection service under the Federal Meat Inspection Act from a packer for an indefinite period, but stayed my order pending appeal. By subsequent orders, including some entered after my order was affirmed by the court of appeals (46 Agric. Dec. ____ (Jan. 28, 1987); 46 Agric. Dec. ____ (Apr. 15, 1987); 47 Agric. Dec. ____ (Jan. 28, 1988); 47 Agric. Dec. ____ (Jan. 29, 1988)), I continued my stay order in effect until the individual, whose criminal convictions prompted the withdrawal of inspection, had the customary 90 days within which to become disassociated from the plant and one year within which to sell his stock, even though my original order contained no such provisions. The Secretary of Agriculture then issued an order assuming direct authority for all further rulings in the case, and vacated my stay orders (47 Agric. Dec. ____ (Mar. 4, 1988)). The

validity of the Department's action is at issue on appeal in *Apex Meat Co. v. Crawford*, No. 88-5646 (9th Cir.).[3]

Finally, it should be noted that when I impose a severe sanction in a Packers & Stockyards Act case, it is not to make my "former agency" look good. For example, in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 634-37 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987), I *sua sponte* increased the suspension period imposed by the ALJ (upon complainant's recommendation) from 35 days to 6 months, notwithstanding complainant's continuing recommendation for a 35-day suspension order. I sharply disagreed with numerous arguments by complainant in favor of a 35-day suspension order, stating (*ibid*):

> Complainant originally recommended a 35-day suspension of respondent's registration, and that recommendation was adopted by the ALJ. However, on respondent's appeal, the Judicial Officer *sua sponte* raised the issue as to whether the suspension period should be substantially increased because the suspension period seemed so far out of line with the Department's sanction policy.
>
> In its brief responding to the issue raised by the Judicial Officer as to whether the suspension period should be substantially increased, complainant continues to recommend a 35-day suspension period. Although complainant now recognizes that a check-kiting scheme "would normally warrant a suspension for a minimum of six months," and states that "[w]ere this case to be brought today, complainant would likely seek a suspension greater than 35 days" (Complainant's Brief at 4), complainant continues to recommend a 35-day suspension period here for a number of reasons.
>
> First, complainant relies on the fact that complainant advised respondent of the sanction it would seek if a hearing were held, and this is a factor which respondents consider in deciding whether or not to settle a case. However, respondents should know (or guess) that the recommendation of complainant as to a sanction, although entitled to great weight, is not controlling. Although the Judicial Officer for many years adhered to the self-imposed limitation that he would never increase the sanction requested by administrative officials, in 1981 he overruled that portion of the Department's sanction policy which provided that the Judicial Officer would never increase the sanction recommended by administrative officials (in order to achieve uniformity

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[3] *Utica* and *Apex* are the only two cases in which the Secretary has interfered with the Judicial Officer's decisions in the more than 45 years since the Secretary's authority has been delegated to the Judicial Officer. I am in complete agreement with the *Utica* holding (781 F.2d at 78) that the Secretary's action violated due process, but it would not be appropriate for me to express any opinion as to his action in *Apex*, while the matter is in litigation.

in sanctions for comparable violations). *In re Rowland*, 40 Agric. Dec. 1934, 1952 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983). Accordingly, at the time the complaint was issued in this case in 1983, a respondent had no guarantee that the Judicial Officer would not increase a sanction recommended by complainant.

Furthermore, the Judicial Officer had long before announced the view that in any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction would be imposed in the pending case, rather than merely announce that in future cases the sanction would be increased. *In re Worsley*, 33 Agric. Dec. 1547, 1569-70 (1974) (Appendix A at 22a-26a).

Accordingly, I give no weight to the facts that complainant's sanction policy in effect when this complaint was brought did not provide for a lengthy suspension order, and that complainant advised respondent prior to the hearing as to the sanction complainant would seek.

Complainant also considered three other "mitigating" circumstances when it originally decided to recommend a 35-day suspension period. First, complainant states (Complainant's Brief at 4-5):

> While the evidence introduced at the oral hearing clearly showed that Dennis Lake, as the owner with the accounting background, must have been and was aware of the check-kiting scheme, Paul Thompson was obviously the official most intimately involved with the scheme. Mr. Thompson died prior to the complaint being issued and while Blackfoot is responsible for his actions, a severe sanction for the check-kiting would not punish the most involved perpetrator.

However, for the reasons set forth above, it would be inconsistent with prior decisions to give any weight to that circumstance.

Complainant also states (Complainant's Brief at 5):

> Another factor was that Uinta Livestock Commission Company, the other participant in the scheme, was never charged because the evidence of the scheme was not discovered until months after Uinta's demise and it was determined that no useful purpose would be served by including a defunct and bankrupt corporation as a respondent.

The fact that a proceeding was not brought against Uinta is not a relevant consideration here, and to use that circumstance as a basis for reducing the sanction imposed here would be contrary to the Department's settled policy to impose severe sanctions for serious

violations to serve as an effective deterrent to the respondent and to other potential violators.

Complainant further states (Complainant's Brief at 5):

> Still another factor was that the ultimate victim of the scheme was the Zions First National Bank, which was at the time vigorously seeking redress against Blackfoot in federal district court.

This, again, is not a circumstance that would be consistent with the Department's sanction policy, and, in addition, Zion was unsuccessful in its action against Blackfoot.

Complainant further states that "[s]uspending an auction market inevitably hurts local consignors" (Complainant's Brief at 5), but it has consistently been held that any hardship to the respondent's community, customers, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interests which might be temporarily damaged as a result of a suspension order.[11] (In addition, Mr. Kienow, Regional Supervisor of Complainant's Omaha office, testified that there were seven other auction markets in the Blackfoot region that were competitors of Blackfoot (Tr. 464)).

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[11] *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. [118 (1984)]; *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. [1151 (1983)]; *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re VPC, Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977).

Complainant cites a number of consent decisions involving check-kiting schemes in which the suspension period varied from 30 days (held in abeyance) to 4 months (Complainant's Brief at 5). But it is well settled that consent decisions are given no weight in determining sanctions in litigated cases. *In re Worsley*, 33 Agric. Dec. 1547, 1569 (1974) (Appendix A at 23a-24a). In the only contested case cited by complainant, a 90-day suspension order was imposed. *In re Amaral & Brazil*, 36 Agric. Dec. 872, 894 (1977). However, in the most recent check-swapping case, *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. [234 (1986)], a 5-year suspension order was imposed. In that case, as in the present case, there were a number of other violations in addition to the check-kiting violations, but, in view of the similarity between this case and *Farmers & Ranchers*, a suspension order of 1 year or more would have to be imposed in the present case to be consistent with *Farmers & Ranchers*. However, in deference to complainant's continued recommendation for a lenient sanction in this case, and since this issue is raised *sua sponte* by the Judicial Officer on respondent's appeal, only a 6-month suspension order will be imposed here.

To conclude, I consider each case very carefully on the merits, reading every word of the record in every case where there is an evidentiary issue. Irrespective of whether the respondents' attorneys do a competent job of protecting their clients' interests, I independently determine whether complainant has carried the burden of proof. Whenever I find that violations have been committed that are regarded by the administrative officials and myself as serious, I impose severe sanctions to serve as an effective deterrent to future violations by the respondents and others, for the reasons set forth in *Spencer*, attached as Appendix B to the original decision herein.

Order

Respondents' petition for reconsideration is denied. The effective date provisions of the previous order shall be governed by service of this order rather than service of the original order.

WARREN BAIN v. SIDNEY, DAVID and JULIE GOODMAN.
P&S Docket No. 6855.
Decision and Order issued September 8, 1988.

Jory Hochberg, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.)*. Complainant filed a formal complaint on October 20, 1986, alleging that the respondents had failed to remit proceeds from the sale of three loads of complainant's livestock in accordance with the contract prices which respondents are alleged to have guaranteed in these transactions. Complainant claims to be damaged in the amount of $4,820.00. Respondents deny that they guaranteed prices to the complainant and alleged that they are owed money for services rendered in connection with marketing the livestock, and for a loan which was made to the complainant during the course of these transactions.

A copy of the investigative report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the rules of practice (9 C.F.R. § 202.101 *et seq.*) was served on the complainant. A copy of the complaint and the investigative report were served on respondents who subsequently filed an answer and request for hearing which was served on the complainant. An oral hearing was held in Los Angeles, California, October 27, 1987. Complainant was represented by Cheryl Bain, and respondents were represented by Julie Goodman. Jory M. Hochberg served as Presiding Officer. Each representative testified for her respective side and was cross-examined by the opposing party. Each party was given the opportunity of filing a post-hearing brief, and complainant availed itself of this opportunity.

Findings of Fact

1. Warren A. Bain, hereinafter referred to as the complainant, is an individual whose business address is 6420 Harrison, Corona, California 91720.

2. Cheryl Bain is an individual whose business address is 6420 Harrison, Corona, California 91720. Cheryl Bain is, and at all times material herein, was the wife of Warren Bain.

3. At all times material herein, the complainant and Cheryl Bain were partners engaged in the business of farming and ranching under the trade name W.A. Bain Cattle.

4. Sidney Goodman, David Goodman and Julie Goodman, hereinafter collectively referred to as the respondents, are individuals whose business

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

order for complainant to be awarded reparation for this shipment, he mus prove by a preponderance of the evidence that respondents either misled him with respect to what he could expect to receive for his livestock or that their negligence or malfeasance otherwise harmed him. We find that complainant has failed to carry this burden. There is some evidence that the market may have been dropping during this period, and while it is possible that the delay in shipment of this load may have affected the price ultimately received, there is insufficient evidence determine whether damages resulted from this delay In summary, there is evidence with respect to this first load that the complainant understood that Ferrara was accepting the first load on consignment to see how complainant's livestock worked, and that, if the packer was satisfied, he would be willing to make future purchases at quoted prices or ranges.

The circumstances surrounding the next two transactions are entirely different. In both cases, we find that respondents were at least negligent in leading complainant to believe that they had negotiated a price or a price range for complainant's livestock when in fact they did not. Mrs. Bain gave clear and credible testimony that respondent Julie Goodman advised her that Avila had agreed to pay $.68 per pound for the second load at the time of shipment. Mrs. Goodman claims to have quoted a minimum price of $.58 at the time of shipment (still more than complainant received), but admits to having quoted a higher price before the livestock were loaded. Indeed, Mrs. Goodman admits that she believed "I had locked in a price with Mr. Avila, being from 58 to 62 cents," and that "I had not done my homework" in keeping track of the market. Mrs. Goodman also acknowledged that she believed it was her responsibility to negotiate the best possible price for complainant in regard to this transaction.

Complainant should also be awarded reparation for the final load which was also shipped to Ferrara. As previously discussed, the record indicates that there was an understanding between the parties that the *first* load was being shipped to Ferrara on a consignment basis. The same cannot be said for the subsequent shipment to Ferrara. The record supports the conclusion that upon arrival of the *first load* at Ferrara, respondent Julie Goodman reported to complainant that he would be paid between $1.19 and $1.25 for that shipment. While this inaccurate representation cannot be said to have caused damages with respect to that first load since the transaction was already completed at the time it was made, it is evidence of respondents' negligent or intentional misrepresentation, and had the effect of inducing complainant to ship the subsequent load to Ferrara. In addition, Mrs. Bain gave credible testimony that complainant was reluctant to ship the last load to Ferrara until respondent Julie Goodman telephoned Ferrara again assured complainant that he would be receiving between $1.19 and $1.25, dressed weight for this last shipment. Respondent Julie Goodman's testimony that complainant was aware at that time of the price which the first load brought, and was content to continue to sell on a consignment basis is simply not credible. We find that

the final load shipped to Ferrara was represented to complainant as having been at a negotiated minimum price of $1.19 per pound, dressed wright, and reparation will be awarded on that load.

Damages for the two loads for which reparation is being awarded are calculated as follows. For the load to Avila, the 47,357 pounds net weight multiplied by $.68 equals $32, 202.76. From this amount one must subtract the $23,532.16 which complainant received from Avila, the $947.14 commission which complainant agreed to pay to respondents and the $670.69 trucking charges billed by respondents. A balance of $7,052.77 remains.

With respect to the load of 38 calves shipped to Ferrara, the dressed wright of 7,643 pound is multiplied by $1.19 for a total of $9,095.17. From this total, one must subtract the $7,221.35 which complainant received from Ferrara, the $299.16 commission owed to respondents, $11.40 for brand inspection, and $38.00 for the beef promotion fee (the propriety of the last two charges are not in dispute; however, the kill charge assessed by Ferrara has not been deducted from the balance since this charge would only have been expected in a consignment sale). Since trucking on this second Ferrara transaction was not provided by respondents, a balance of $1,525.26 remains.

Therefore, the net amount owing on these two loads is $8,578.03, less the $5,000 advance which complainant received from respondents. Reparation will be awarded to the complainant for a balance due of $3,578.03.

While respondent Julie Goodman handled many of the details concerning these transactions, the record supports an order against the three family members named as respondents in this proceeding. Each individual took part in one aspect or another of these transactions and the record supports the conclusion that each was aware or should have been aware of the actions constituting violations of the Act. Neither David Goodman nor Sidney Goodman appeared at hearing to disclaim responsibility for the transactions, and so we infer that their testimony would have been adverse; *Arab Stock Yard*, 37 Agric. Dec. 293 (1978) (While Warren A. Bain did not testify, it is uncontested that he had a conflicting court date on the date of hearing and the record reflects that he had requested a continuance, although this request was denied because it was not made in a timely manner). Moreover, it is apparent that the Goodman family members carried on their other livestock business as a family enterprise. We find that the three individuals named as respondents were engaged in a partnership or joint venture with respect to the transactions involved herein.

All contentions of respondents presented for the record have been carefully considered whether or not specifically mentioned herein and have been found without merit. Accordingly, respondents shall be ordered to pay reparation to complainant for the unpaid balances owing on the shipments of 107 head to Avila and 38 head to Ferrara.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, 42 FR 4395, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. § 450c-450g. See also Reorganization Plan No. 2 of 1953 (5 U.S.C., 1976 Ed., appendix p. 764). It constitutes "an order for the payment of money" within the meaning of section 309(f) of the Act (7 U.S.C. § 210(f)).

Under that section if respondents do not comply with this order within the time limit in this order, complainant may within one year of the date of this order file in the district court of the United States for the district in which it resides or in which is located the principal place of business of respondent, or in any state court having general jurisdiction of the parties, a petition setting forth briefly the causes for which it claims damages and this order in the premises. That section further provides that such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and order herein shall be prima facie evidence of the facts herein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent state of the proceedings unless they accrue upon appeal. That section further provides that, if the petitioner finally prevails, it shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

It is requested that copies of all pleading filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D.C. 20250, for inclusion in the file of this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D.C. 20250.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see rule 17 or the Rules of Practice, 9 CFR § 202.117.

On respondents' right to judicial review hereof, see *Maly Livestock Commission v. Hardin et al.*, 446 F. 2d 4, 30 Agric. Dec. 1063 (8th Cir., 1971).

Order

Within thirty days from the date hereof, respondents shall pay complainant as reparation the sum of $3,578.03 with interest thereon at the rate of 13 per cent per annum from October 1, 1986, until paid.

COURT DECISIONS

FINEST FRUITS, INC., Plaintiff, v. KOREAN PRODUCE CORPORATION, Defendant. COOSEMAN'S SPECIALTIES, INC., ET AL., Plaintiff, v. KOREAN PRODUCE CORPORATION, Defendant.
87 Civ. 6579 (SWK).
Decided September 6, 1988.

PACA statutory trust -- Insufficient amount of trust funds results in pro rata distribution to all beneficiaries.

Legislative intent of the PACA trust regulations provides for a pro rata distribution of trust assets to all trust beneficiaries where the amount of funds is insufficient to pay all unpaid beneficiaries. This interpretation is in accordance with the purpose of the trust which is to protect all unpaid sellers and suppliers of agricultural commodities.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY WOHL KRAM, U.S.D.J.

MEMORANDUM OPINION AND ORDER

This case first came before this Court on plaintiff Finest Fruit Inc.'s ("Finest"'s) motion for a preliminary injunction ordering defendant Korean Produce Corporation ("Korean") to deposit certain monies into an interest bearing account under court supervision, pursuant to Section 5(c) of the Perishable Agricultural Commodities Act of 1930 ("PACA"), as amended, 7 U.S.C. 499e(c)[1], pending final determination of this action. In a Memorandum Opinion and Order dated October 2, 1987 this Court granted Finest's motion in substantial part, and ordered that defendant place $29,466.50 in an interest bearing trust account.

On October 15, 1987 Cooseman Specialties Inc. ("Cooseman") and the other plaintiffs ("plaintiffs") to this action filed a complaint asking that certain funds be set aside for their claims against Korean. The actions were subsequently consolidated.

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[1] PACA provides, in relevant part, that "[p]erishable agricultural commodities received by a commission merchant, dealer, or broker in transactions, and all inventories of food or other commodities derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents."

This case is now before this Court on Korean's motion for summary judgment asking that the funds now in the trust - $29,466.50 - be released to it. Both the Cooseman plaintiffs and Korean oppose this motion on the grounds that pursuant to PACA law there should be a *pro rata* distribution of the assets. Both request Rule 11 sanctions and attorney's fees.

Discussion

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c). In testing whether the movant has met this burden, the Court must resolve all ambiguities against the movant. *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1187 (2d Cir. 1987) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970). The movant may discharge this burden by demonstrating to the Court that there is an absence of evidence to support the non-moving party's case on which that party would have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party then has the burden of coming forward with "specific facts showing that there is a genuine issue for trial." Rule 56(e). The non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita ectric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). eculation, conclusory allegations and mere denials are not enough to raise nuine issues of fact. To avoid summary judgment, enough evidence must vor the non-moving party's case such that a jury could return a verdict in its ivor. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) (interpreting he "genuineness" requirement).

The basis of Finest's argument is that it is entitled to the trust money because (1) there exists no legal or factual dispute that at least that sum of money is owed by Korean to Finest, and (2) the other plaintiffs filed their claims after Finest and therefore are precluded from recovery under a "first in time, first in right" theory allegedly applicable to PACA situations. The Cooseman plaintiffs and Korean contest the motion on the legal grounds that ie "first in time, first in right" theory does not apply in PACA situation where a *pro rata* distribution is mandated, and that even if it did, Finest was not the *first*, but the *twenty-first*, to file its claim against Korean.[2] Finest contends in

[2] In his affidavit in response to Finest's motion, the attorney for the Cooseman plaintiffs ppears also to ask this Court that a pro rata distribution of the trust funds - including some [15,000 in additional funds apparently being held in escrow by the Cooseman plaintiffs' torney and by a trade organization in which all plaintiffs are a member - be made to all the laintiffs. The Cooseman plaintiffs have not formally moved for such a distribution, and in the

(continued...

reply that under the "first in time first in right" theory the triggering act is the obtaining of prejudgment attachment or execution of a judgment and not the filing of a claim.

Under Rule 69 of the Federal Rules of Civil Procedure, "[t]he procedure on execution [of a judgment] shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable".[3] Finest argues that under this Rule, New York law regarding priority of claims should be applied in this PACA case. Finest cites *City and County Savings Bank v. Oakwood Holding Corp.*, 387 N.Y.S.2d 512, 88 Misc. 3d 198 (Supreme Court, Chemung County 1976) for the proposition that under New York law "the common law rule of first in time, first in right may of course be altered by statute, but in the absence of any legislative changes it is well established that the common law rule still controls." 387 N.Y.S. 2d at 514 (court found that lien priorities are not strictly matters of statutory creation and concern, but are governed in the first instance by common law rule of first in time first in right in the absence of statutory directive to the contrary).[4]

The Cooseman plaintiffs and Korean argue that the first in time, first in right rule should not be applied here because there is statutory directive to the contrary. They assert that while the language of the PACA statute itself is admittedly silent as to priority, the clarifications published in response to comments sent to the United States Department of Agriculture during the thirty-day comment period following the proposal of the regulations which govern the PACA trust show that the legislative intent was for a pro rata distribution. Those clarifications which are published in the Federal Register state: "One commentator asked whether there would be a pro-rata distribution of assets in instances where there were insufficient funds to pay the full amount owed the creditors. Where USDA may become involved, an

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[2](...continued)
absence of such a motion, and its appropriate briefing, this Court will decline to rule on this "request" at this time.

[3] This Court notes that at this juncture no judgment has been entered in this case in Finest's favor, although Finest contends that the parties do not dispute that Finest is owed certain monies by defendant. Because this Court rules that Finest would not be entitled to a distribution of all the PACA assets at this juncture even if judgment had already been entered in its favor, it will not reach this issue.

[4] With regard to attachments Section 5234 of New York's Civil Practice Law and Rules ("CPLR") provides that creditors who have issued executions, or plaintiffs who have obtained attachments under Article 62 of the CPLR who have all delivered their execution or attachment orders to the same officer, priority is in the order of delivery.

informal distribution would be made on a pro-rata basis to beneficiari have protected their rights to trust assets. *Where a court is involved would recommend that the available trust assets be distributed on a p basis to all beneficiaries who have protected their rights to benefits*". 4 Reg. 45735-45736 (emphasis added).

The Cooseman plaintiffs have also submitted the affidavit of Jc Flanagan, the Chief of the PACA Branch, Fruit and Vegetable Di Agricultural Marketing Service, United States Department of Agricultur was involved in the drafting of the regulations which implemented thc provisions PACA and in the development of the plan by which the t administered. In his affidavit, Flanagan states: "As was represent Congress by the Department of Agriculture during the hearings leading enactment of the trust, it is appropriate that where the amount of funds trust is insufficient to pay all unpaid trust beneficiaries, a pro-rata distril of trust assets should be made to those suppliers which file valid claims" at 5.

In light of this evidence, and in the absence of any legal authority t contrary, this Court finds that the legislative intent behind the PACA regulations was that trust assets be distributed on a pro rata basis bet those suppliers who file valid claims. This Court finds that this interpret rests more soundly with the purpose of the trust: to protect all unpaid s or suppliers of agricultural commodities. A race to the courthouse winner take all does not seem to accord with this purpose. Finest's m for summary judgment granting the proceeds of the PACA trust in this a is thus denied.

The Cooseman plaintiffs and Korean have also moved for Rul sanctions and an award of costs and attorney's fees against Finest. This C finds that Finest's efforts with regard to this motion do not warrant t actions. Although this Court did indicate to Finest's counsel its dc regarding the merits of its motion, there appears to be a dearth of auth on the point Finest attempted to argue and it appears that counsel eng in a good faith effort to make his argument. The Cooseman plaintiffs's Korean's motion for Rule 11 sanctions and costs and attorney's fees is denied.

SO ORDERED.

RICHARD E. LYNG, Secretary, UNITED STATES DEPARTMENT OF AGRICULTURE, and INMAN FARMS, INC., Plaintiffs v. SAM COMPTON PRODUCE COMPANY, INC., et al., Defendants.
Civ. 3-86-759.
Decided August 31, 1988.

PACA statutory trust--Unpaid seller has priority over secured or unsecured third party--Recovery of dissipated assets allowed from third party who had notice that transfer was in breach of trust.

Pursuant to the trust provisions of the PACA, an unpaid seller's interest in trust assets remaining in the hands of the dealer/broker takes priority over any interest of third parties, secured or unsecured. Trust assets that have been dissipated may be recovered from third parties who knew or reasonably should have known that the assets were transferred to them in breach of trust. The PACA does not limit the length to which assets may be traced, nor does the PACA require pursuit of "primary" trust assets before tracing dissipated assets into the hands of third parties. The PACA trust provisions apply to repayment of debts accrued before the passage of the 1984 amendments.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

MEMORANDUM OPINION

This is an action brought by the Secretary of Agriculture and an unpaid seller of potatoes, Inman Farms, Inc., under §5(c) of the Perishable Agricultural Commodities Act, 7 U.S.C. §§499, *et seq.*, (hereinafter "PACA"). The plaintiffs allege that defendant Sam Compton Produce Company, Inc. (hereinafter "Compton") made a number of purchases of perishable agricultural commodities between December 21, 1984 and June 22, 1985 from Inman and two other sellers whom it has failed to pay. Plaintiffs contend that Compton wrongfully dissipated the funds of the trust created by 7 U.S.C. §499(c) by paying the proceeds of these trusts to various creditors and other defendants. In addition to Compton, plaintiffs have named the following as defendants who received the dissipated trust funds: Minyard A. Compton; Bud Compton, Inc.; Barry Compton; Compton Sales Company, Inc.; Third National Bank in Knoxville; Norman Burger; Valley Fidelity Bank & Trust Company; Towne Lodge, Inc.; M. S. Thigpen Produce Company, Inc.; Michael Thigpen; Wade E. Boswell; Wade H. Boswell, M.D., P.S.C.; Wade Boswell, M.D., P.S.C. Retirement Fund; Burton Simcox; and Alex Curtis. Many of the defendants made unsecured loans to Compton and they received monies from either Compton or Minyard Compton's personal account in repayment during the period that these trusts were in effect. Virtually all of the parties have filed a motion for summary judgment, and the following are currently pending:

(1) The motion for summary judgment of defendant Wade Boswell [Court File #135];

(2) The motion for summary judgment of Wade H. Boswell, M.D., P.S.C. [Court File #136];

(3) The motion for summary judgment of Wade Boswell, M.D., P.S.C. Retirement Fund [Court File #137];

(4) The motion for summary judgment of defendant Valley Fidelity Bank & Trust Company [Court File #142];

(5) The motion for summary judgment of defendants Curtis, Simcox & Towne Lodge, Inc. [Court File #148];

(6) The motion for summary judgment of First American National Bank [Court File #150];

(7) The Secretary's motion for summary judgment against defendants Sam Compton Produce Company, Inc., Minyard A. Compton, Bud Compton, Inc., Barry Compton Sales Company, Inc., Third National Bank in Knoxville, and First American National Bank [Court File #153];

(8) Inman Farms' motion for summary judgment against Minyard A. Compton, Barry Compton, Compton Sales Company, Inc., Third National Bank in Knoxville, Valley Fidelity Bank & Trust Company, Towne Lodge, Inc., Burton Simcox, Alex Curtis, M. S. Thigpen Produce Company, Inc., and Michael Thigpen [Court File #158];

(9) The amended motion for summary judgment of defendants Curtis, Simcox and Towne Lodge, Inc. [Court File #169];

(10) The motion for summary judgment of defendant Michael Thigpen [Court File #175];

(11) The motion for summary judgment of defendant M. S. Thigpen Produce Company, Inc. [Court File #178]; and

(12) The motion for partial summary judgment concerning the claim of Inman Farms by defendant Norman Burger [Court File #196].

I.

The PACA Trust Provisions

Before addressing the individual motions for summary judgment, it will be elpful to review the applicable PACA provisions and to address generally everal issues which are common to more than one defendant in this case.

The PACA, 7 U.S.C. §499, *et seq.*, was amended in 1984 for the purpose f impressing certain agricultural commodities received by a broker/dealer

with a trust. The trust is created by the language of §499e(c)(2) which provides as follows:

> Perishable agricultural commodities received by a commissioned merchant, dealer, or broker in all transactions, and all inventories or food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker, in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

It is beyond question that through this trust provision Congress intended to provide for sellers of agricultural commodities the same sort of protection against other creditors of a delinquent broker/dealer which is provided for livestock dealers in the 1976 Amendments to the Packers and Stockyards Act. H.R. Rep. No. 98-543, 98 Cong., 1st Sess. 4 (1983), reprinted in 1984 U.S. Code Cong. Ad. News 405, 407. In interpreting the PACA trust provisions, it is clear that Congress intended that courts could look to precedents established under the Packers and Stockyards Act. *In re Fresh Approach, Inc.*, 48 B.R. 926 (Bkrtcy, N.D. Tex. 1985).

In order to insure the protection of the trust, the unpaid seller or supplier must comply with the notice provisions of §499e(c)(3). Although for the most part there has been no dispute that the sellers in the instant case complied with the notice provisions of this section, at least one of the defendants raises an issue as to whether the notices were actually received by Compton. *See* Third National Bank's Response to the Secretary's Motion for Summary Judgment [Court File #209].

Finally, §499e(c)(4) provides that the district courts for the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary to prevent or restrain dissipation of the trust.

In the instant case, there is no question that Compton has violated the trust provisions of PACA by dissipating trust assets. The major issues presented in the instant case concern the extent to which those dissipated trust assets may be traced into the hands of third parties or even fourth parties, and those parties forced to disgorge those assets. Although there is scarce case authority on these two issues, that which exists is expressed mainly through two divergent opinions. The first is a Packers and Stockyards Act case, *In re Gotham Provision Company, Inc.*, 669 F.2d 1000 (5th Cir. 1982). The second is a PACA bankruptcy, *In re Tanner*, 77 B.R. 897 (Bankr. N.D. Ala. 1987). This court, while in general agreement with principles enunciated in both cases, is in complete agreement with neither case.

In *Gotham*, several livestock producers filed a counterclaim in an adversary proceeding against a bank to recover amounts necessary to compensate them for cash sales of cattle made to a failed meat packer on the theory that funds dissipated from the meat packer to the bank were subject to the trust created under the Packers and Stockyards Act. The Fifth Circuit Court of Appeals found that the trust consisted of a floating pool of assets derived from the livestock producers' livestock, as well as inventories, receivables and proceeds derived from other cash sellers' livestock. *Id.* at 1010. The court went on to find that the livestock producers could trace these trust assets into the hands of the bank. The court reasoned:

> According to general principles of trust law, noted by the bankruptcy court below, where trust funds are commingled with funds not subject to the trust, a lien of the entire commingled fund exists for the benefit of the beneficiaries of the trust, and those who receive a transfer of assets from the commingled fund with actual or constructive notice of the trust are subject to the lien. Scott, *The Law of Trusts*, §§219.4, 519.1 (3rd ed. 1967). In this case, the Bank had constructive notice of the trust because a federal statute created the trust.

Id., at 1011. This court is in agreement with the Fifth Circuit Court of Appeals that third parties dealing with meat packers (or commodities dealers) have constructive notice of the trust because a federal statute creates the trust. However, this court disagrees with the *Gotham* court that constructive notice alone is enough to require those who receive trust assets to disgorge them. This court is of the opinion disgorgement from third parties requires notice that the transfer to them is in breach of trust. In making this determination, this court, as did the *Gotham* court, relies on general principles of trust law. Under those principles, with respect to the liability of transferees of trust property, the Restatement 2nd of Trusts provides, *inter alia*, as follows:

> §2.84 A Bona Fide Purchaser.
>
> (1) If the trustee in breach of trust transfers trust property to, or creates a legal interest in the subject matter of the trust in, a person who takes for value and without notice of the breach of trust, and who is not knowingly taking part in an illegal transaction, the latter holds the interest so transferred or created free of the trust, and is under no liability to the beneficiary.

. . . . .

§2.96. Notice of Existence of Trust.

If the trustee transfers trust property in breach of trust to a transferee for value, the transferee takes free of the trust although he has notice of the existence of the trust, unless he has notice that the trustee is committing a breach of trust in making the transfer.

Restatement of the Law of Trusts, 2nd, §284, §296 (1959). Professor Scott observes the existence of the same rule:

Notice to the Transferee of Trust Property. As we have seen, where a trustee in breach of trust transfers trust property to a person who takes with notice of the breach of trust, the transferee takes the property subject to the trust. If the trustee does not commit a breach of trust in making the transfer, the transferee takes the property free of the trust. Even if the transfer is made in breach of trust and the transferee has notice of the existence of the trust, he does not take subject to the trust if he paid value for the property, unless he had notice that the trustee was committing a breach of trust in making the transfer. It is only where the transferee for value knows or ought to know that he is participating in a breach of trust that he takes the property subject to the trust.

Scott, *The Law of Trusts*, §296 (3rd ed. 1967). Thus, under general principles of trust law, third party transferees for value, even if aware of the existence of the trust, need not disgorge those assets unless they have notice that the trustee is committing a breach of trust in making the transfer. The court notes that a person has notice of a breach of trust if "he knows or should know of the breach of trust." *Restatement 2d of Trusts*, §297 (1959).[1]

[1] It is observed that under §297(b), notice of a breach of trust is also found where "by statute or otherwise [a transferee] is subjected to the same liabilities as though he knew or should have known of the breach of trust, even though in fact he did not know and had no reason to know of the breach of trust." The court finds nothing in the PACA statute or its legislative history to indicate that such a result was intended with respect to third-party transferees who received trust assets.

This court concludes that under the trust provisions of the PACA, trust assets may be traced into the hands of those who know or should know of a breach of trust by the trustee.[2] To the extent that *Gotham* would require third-party transferees who do not or should not know of a breach of trust to disgorge assets received, this court disagrees with the United States Court of Appeals for the Fifth Circuit.

In *Tanner*, a supplier of agricultural commodities brought an action against a broker/dealer of such commodities who had filed for relief under Chapter 7 of the Bankruptcy Code. Plaintiff contended that the debtor had used the moneys received from the sale of the produce to pay other creditors. The Bankruptcy Court defined the issue presented as follows: Can the plaintiff pursue PACA funds into the hands of third-party payees who received the funds in payment of antecedent debts for goods or services rendered? *Tanner*, 77 B.R. at 898-99. Although the Bankruptcy Court concluded that it lacked jurisdiction over the claim, the court went on to opine that PACA did not authorize plaintiff to trace funds into the hands of creditors who were paid in the ordinary course of business.

> The Plaintiff alleges that PACA authorizes it to trace funds into the hands of Tanner's creditors who were paid in the ordinary course of business. This Court disagrees. It is the opinion of this Court that PACA does not authorize the Plaintiff to trace funds into the hand of third-party payees like the corner grocery store, the telephone company, or the United States as payee of income taxes, etc.

Id., at 900-901. In a footnote which has generated much controversy among the parties in the instant case, the *Tanner* court went on to suggest the following:

> Put simply, this Court does not believe the PACA authorizes trust beneficiaries to trace trust funds into the hands of third parties who (1) had no knowledge of the character of the funds received and (2) received monies for the payment of antecedent debts for services or goods.

Id., at 901, n.9.

Defendants in the instant case cite *Tanner* first for the proposition that trust assets cannot be traced into the hands of creditors paid in the "ordinary

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[2] The court is aware that the PACA statute in creating the trust provisions gives the producer a type of "super priority" over lenders of the broker/dealer with regard to trust assets which remain in the hands of the broker/dealer. Obviously, this priority exists with regard to the trust assets whether or not the lender has notice of a breach of trust. However, a separate question is presented where the assets have already been dissipated, as in the instant case. Rather than a question of priority, it is a question of requiring "disgorgement" by potentially innocent third parties. In such cases, under general principles of trust law, knowledge of the breach of trust should be considered.

course of business". However, *Tanner* cites no authority for this proposition nor has this court uncovered any in the statute itself, the legislative history or under general principles of trust law. While it may be a rare case, I am of the opinion that nothing in the PACA statute prohibits the tracing of assets into the hands of any creditor who takes with knowledge of the breach of trust, whether it be the corner grocery store or a bank. To that extent, this court disagrees with *Tanner*.

Defendants also cite *Tanner* for the proposition that PACA does not authorize trust beneficiaries to trace trust funds into the hands of third parties who, without knowledge, received monies for the payment of antecedent debts for goods or services. To the extent that this is consistent with the general principles of trust law set out above, this court is in agreement with the *Tanner* court. However, the question of whether a third party knew or should have known of the breach of trust is one which involves information that is particularly within the knowledge of that third party. It is not the type of question well suited for summary adjudication. It is also a question that plaintiffs may often have to prove through circumstantial evidence. For example, knowledge by the third party of a broker/dealer's rapidly deteriorating financial condition, along with knowledge of the nature of the broker/dealer's business could warrant a fact finder in inferring that the third party knew or might reasonably suspect a breach of trust.

Defendants in this case are, for the most part, unsecured lenders of funds to Compton. They contend that the PACA trust provision, based on the stated purposes of the amendments, should be interpreted to apply only to secured lenders. The court agrees that the primary aim of the amendments appears to have been to protect producers of agricultural commodities from blanket security agreements given by broker/dealers to secured lenders. However, the protection afforded was not so limited. The Act broadly created a trust fund to protect the unpaid seller and nothing in the Act or the legislative history indicates that it cannot apply to unsecured creditors. Nor would such a construction make sense since an unpaid seller could be equally devastated by the interests of an unsecured creditor.

Several of the defendants in this case are not third party transferees of trust assets, but actually fourth party transferees. These defendants allegedly received trust assets when they were transferred from Compton through Minyard Compton and then to them. Then contend that the assets cannot be traced that far, particularly since they did not actually deal with Compton and therefore "constructive knowledge" of the trust, *see Gotham*, 669 F.2d at 1011, cannot be imputed to them. While it may be more difficult to prove knowledge with respect to these defendants, the court is of the opinion that if plaintiffs can prove that these defendants knew of the breach of trust, plaintiffs may be able to trace these assets into their hands. Nothing in the PACA statute limits the length to which these assets may be traced, assuming

the requisite knowledge. Any other result would encourage disreputable dealers to channel trust assets through conduits.

Defendants Curtis, Simcox and Towne Lodge, Inc. argue that the plaintiffs cannot begin tracing trust assets into the hands of third parties until a breach of trust has been established. They argue that no breach of trust can be established in the instant case until the primary trust assets have been depleted. The primary asset remaining in the hands of Compton is an account receivable owed by defendant Norman Burger. The other defendants contend that no breach of trust can occur so long as this asset remains unexhausted. The court disagrees.

Upon review of the provisions of the PACA and the Secretary of Agriculture's regulations promulgated thereunder, it is apparent that the triggering event with respect to breach of the trust provisions is a failure by a dealer/broker to timely pay for the agricultural commodities in question. *See* §499e(c)(3) (providing that the notice provisions must be complied with within 30 days of passage of the time set for payment); 7 C.F.R. §46.46(b)(3) (defining "default" as failure to pay promptly money owed in connection with transactions in perishable agricultural commodities). The court is of the opinion that breaches of trust occurred in this case when Compton failed to timely pay for the potatoes it received.

The court finds nothing in the language of the PACA itself or its legislative history to indicate that plaintiffs must pursue "primary" trust assets first before tracing dissipated assets into the hands of third parties. In fact, such a construction would be contrary to the liberal construction that is to be afforded the PACA provisions in favor of unpaid sellers of agricultural commodities. Moreover, such a construction is contrary to general principles of trust law which permit a beneficiary to pursue to the trustee, the transferee, or both. *See Scott on Trusts*, §295.1. Finally, in the instant case, there is no proof that there are any other assets remaining with Compton other than the Burger account receivable, and Mr. Burger denies that he owes it. The longer plaintiffs are forced to wait to trace trust assets, the more difficult will be the recovery of those assets. Absent something in the statute or the legislative history to indicate that that is what Congress intended, I cannot believe that Congress intended the unpaid seller to pursue every contingent asset in the hands of the trustee to exhaustion before pursuing trust assets in the hands of third parties. I am of the opinion that Congress intended to permit the unpaid seller the flexibility to pursue both.

Finally, Third National Bank in Knoxville argues that the PACA amendments should not have any application to repayment of funds made on loans which were made prior to the effective date of the PACA amendments in 1984. Apparently, some of the monies received by Third National were for such loans. The court finds nothing in the PACA statute itself or its legislative history to suggest that the amendment provisions were to have prospective effect only. The PACA trust provisions, like those of the Packers and Stockyards Act, must be liberally construed to protect unpaid sellers of

produce. *In re Frosty Morn Meats, Inc.*, 7 B.R. 988, 1013 (M.D. Tenn. 1980). The court concludes that Congress intended that the PACA trust provisions would apply to repayment of debts accrued even before the passage of the amendments.

To summarize, the PACA trust provisions, assuming all notice provisions have been complied with, set up two levels of protection for unpaid sellers of agricultural commodities. First, with regard to trust assets remaining in the hands of the dealer/broker, the producer's interest takes priority over any interest that third parties, secured or unsecured, have in the proceeds from their products. Those assets are preserved as a nonsegregated "floating" trust. Second, with regard to assets already transferred from that trust to third parties, under ordinary trust principles, those proceeds may be recovered from transferees who knew or reasonably should have known that the assets were transferred to them in breach of the trust. To the extent that this court's prior memorandum is inconsistent with this interpretation, that memorandum is hereby vacated.

With the above guidelines in mind, this court turns to the individual motions for summary judgment.

II.

The Motions for Summary Judgment of Wade Boswell, Wade Boswell, M.D. PSC and Wade Boswell, M.D. PSC Retirement Fund

Mr. Boswell is a psychiatrist and friend of Minyard Compton who maintains funds in a retirement plan which lent funds to Sam Compton Produce Company, Inc. Mr. Boswell contends that neither he nor Wade H. Boswell, M.D. PSC received any funds from Compton after the date of the establishment of the trust. Defendants admit that the retirement fund received $46,563.50 on or after December 27, 1984, but before February 5, 1985. Thus, defendants contend that those payments were received prior to the creation of the trust in favor of John W. Stone and Inman Farms, Inc. Therefore, defendants contend that Wade H. Boswell and Wade H. Boswell, M.D. PSC should have summary judgment with respect to the claims against them, and that Wade H. Boswell, M.D. PSC Retirement Fund should have partial summary judgment in its favor on the claims of John W. Stone, nc. and Inman Farms, Inc. The defendants submit the affidavit of Wade H. Boswell, M.D., affirming these facts.

In response, Inman Farms suggests that the fact that Minyard Compton and Boswell are good friends and neighbors and that Compton still Boswell several hundred thousand dollars indicates that it is questionable whether Boswell or the Boswell entities received nothing from Compton after February, 1985. Inman Farms has produced no supporting affidavits. Under the circumstances, Wade Boswell and Wade H. Boswell, M.D. PSC are

entitled to summary judgment since no genuine issue of material fact remains to be determined. Rule 56, Federal Rules of Civil Procedure. Mere speculation and conjecture on the part of plaintiffs' counsel is not sufficient evidence to defeat a motion for summary judgment. Accordingly, the motion for summary judgment of Wade Boswell and Wade H. Boswell, M.D. PSC is GRANTED. The motion for partial summary judgment of Wade Boswell, M.D. PSC Retirement Fund is GRANTED TO THE EXTENT THAT its liability will be limited to $46,563.50.

III.

The Motion for Summary Judgment of
Defendant, Valley Fidelity Bank & Trust Company

In 1985, Compton executed two promissory notes in favor of this defendant in the amount of $22,000.00 and $26,180.00. The purpose of these loans was apparently to loan money to Compton for insurance premiums due on a commercial insurance policy. Between July, 1985 and September, 1987, the loan balance on these two promissory notes was reduced to zero. Plaintiffs contend that these reductions were made out of trust assets.

In its motion for summary judgment, Valley Fidelity makes multiple arguments, the majority of which are discussed in Section I above and will not be repeated here. Valley Bank makes the additional argument that Inman Farms lacks standing to bring this action because Valley Bank is not a "commission merchant, dealer or broker". The court is of the opinion that the PACA statute is not so limited as to preclude plaintiffs from recovering trust assets from third party transferees of those assets.

Valley Fidelity also argues that the payments on these notes were made by checks drawn on Minyard Compton's personal account and therefore it did not receive trust assets. However, there is evidence in the record to indicate that Minyard Compton transferred over $100,000.00 from the Compton account to his own personal account during the period of the existence of the trust in this case and the closed out the Compton account. The court is of the opinion that the question here is whether Valley Bank knew or should have known that these funds were being transferred to it, through Minyard Compton's personal account, in breach of PACA trust provisions. The court cannot say that no question of material fact remains on the issue of Valley Bank's knowledge. In light of this question of material fact, Valley Fidelity's motion for summary judgment [Court File #142] will be DENIED.

IV.

The Motion for Summary Judgment of Defendants Curtis, Simcox and Towne Lodge, Inc.

Defendants Alex Curtis, Burton Simcox, and Towne Lodge, Inc. argue that they received no funds from Compton after June 2, 1985. They did receive funds from Minyard A. Compton and his wife, Imogene L. Compton, after June 2, 1985. Again, I am of the opinion that a question of material fact remains to be determined with respect to these defendants' knowledge or lack of knowledge that the funds they received were transferred to them in breach of trust. The court is of the opinion that if these defendants had such knowledge, the fact that the funds were transferred through Minyard Compton's personal account is irrelevant. In light of the foregoing, the motion for summary judgment of defendants Curtis, Simcox, and Towne Lodge, Inc. [Court File #148] will be DENIED.

V.

The Motion for Summary Judgment of Defendant First American National Bank

Compton made payments of $6,977.12 to First American National Bank between January 18, 1985 and April 30, 1985, for crediting an antecedent debt arising out of unsecured insurance premium financing notes. The court is of the opinion that the issue here again is the knowledge of the bank that these funds were transferred in breach of trust.

With respect to other amounts sought by the plaintiffs against this defendant, it is undisputed that these funds were paid into the Boswell account. Thus, these other funds were not trust assets transferred to First American National Bank and the bank is entitled to summary judgment on these claims.

Accordingly, First American National Bank's motion for summary judgment will be GRANTED IN PART and DENIED IN PART. With respect to the $6,977.12 transferred between January 18, 1985 and April 30, 1985, the motion for summary judgment is DENIED. In all other respects, the motion for summary judgment [Court File #150] is GRANTED.

VI.

The Secretary's Motion for Summary Judgment Against Sam Compton Produce Company, Inc., Minyard A. Compton, Bud Compton, Inc., Barry Compton, Compton Sales Company, Inc., Third National Bank in Knoxville, and First American National Bank

There is no dispute that Minyard A. Compton dissipated trust asset Accordingly, summary judgment will be granted on the question of liability in favor of plaintiffs against Minyard A. Compton.[3] There is a factual dispute over the amount of damages to which plaintiffs are entitled against Minyard A. Compton as he contends that he repaid most of the dissipated trust assets. The total amount of liability on his part must await a hearing.

With respect to the other defendants the Secretary is moving against, the court is of the opinion that a question of material fact remains to be decided regarding their knowledge that the funds they received were dissipated trust assets.

The court notes that defendant Third National Bank also raises a question concerning whether the plaintiffs fully complied with the notice provisions o 7 U.S.C. §499e(c)(3). Under that section, the unpaid seller or supplier nee give written notice of intent to preserve the benefits of the trust to the Secretary of the United States Department of Agriculture and to the commission merchant, dealer or broker. Although initially plaintiffs raised b affidavit a question of fact as to whether that notice was given to the merchan or dealer, later proof by plaintiffs has demonstrated that those affidavits wer indeed sent and defendants have been unable to unequivocally deny that the were received by one of Compton's agents. The court concludes that plaintiff have sufficiently demonstrated there is no material question of fact remainin as to whether plaintiffs have complied with the notice provisions of the statut Absent any proof by defendants, the plaintiffs are entitled to presume that th notice was received in the ordinary course of the mail at Compton's busine address.

Accordingly, the Secretary's motion for summary judgment will b GRANTED against Minyard A. Compton on the issue of liability. In all othe respects the motion for summary judgment [Court File #153] will b DENIED.

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[3] Default has already been entered against Sam Compton Produce Company, Inc.

VII.

The Motion for Summary Judgment of Plaintiff, Inman Farms

Inman Farms moves for summary judgment against Minyard A. Compton, Barry Compton, Compton Sales Company, Inc., Third National Bank in Knoxville, Valley Fidelity Bank & Trust Company, Towne Lodge, Inc., Burton Simcox, Alex Curtis, M. S. Thigpen Produce Company, Inc., and Michael Thigpen. As indicated above, there is no dispute that Minyard A. Compton dissipated trust assets, including those held in trust for Inman, and that on the question of liability Inman is entitled to summary judgment against Minyard A. Compton. The amount of damages remains to be determined against Mr. Compton. With respect to the other defendants, a question of material fact remains to be determined as to whether they had knowledge or should have known that the transfer of assets to them was in breach of the trust provisions. Accordingly, Inman Farms' motion for summary judgment [Court File #158] will be GRANTED with respect to liability against Minyard A. Compton and DENIED in all other respects.

VIII.

The Motions for Summary Judgment of Michael Thigpen and M. S. Thigpen Produce Company, Inc.

Michael Thigpen contends that he did not trade with Compton individually nor has he ever individually been in possession of any trust assets. Apparently M. S. Thigpen Produce Company, Inc. was the company with which Compton dealt through buying, selling and trading produce. Inman contends that there is a material dispute as to whether Thigpen ever personally conducted business with Compton or Minyard Compton. Inman points out that Minyard Compton, in his deposition, referred to "people like . . . Thigpen" advancing money to Compton and testimony regarding whether Sam Compton still owed money to Thigpen. However, the question is not whether Thigpen ever personally conducted business with Compton or whether Compton now owes money to Thigpen individually, but whether Michael Thigpen individually ever received any trust assets. The plaintiffs have come forward with no evidence that he ever did and there is no question of material fact on this issue. Accordingly, Michael Thigpen's motion for summary judgment [Court File #175] will be GRANTED.

Defendant M. S. Thigpen Produce Company, Inc. argues that between 1984 and 1987, except for $1,000.00, it never received any funds or assets from Compton or Minyard Compton. Thigpen Produce contends that between 1984 and 1987 it purchased potatoes from Sam Compton and may payments in advance. Thus, it argues that any potatoes of the plaintiffs which it might have received it had already paid for in advance. Plaintiffs contend that those

potatoes were PACA trust assets, as was the $1,000.00 Thigpen Produce admittedly received. The court agrees with plaintiffs that, under the language of §499e(c)(2), "all inventories of food or other products derived from perishable agricultural commodities", including the potatoes in this case, would have been trust assets. The court concludes that Thigpen Produce may have received trust assets, including potatoes and the $1,000.00 loan repayment. Again, the question presented will be whether Thigpen Produce had the requisite knowledge that these potatoes or monies were transferred to it in breach of the trust. The court is of the opinion that this raises a question of material fact. Therefore, Thigpen Produce's motion for summary judgment [Court File #178] will be DENIED.

VIII.

Norman Burger's Motion for Partial Summary Judgment Concerning the Claim of Inman Farms

Plaintiff Inman contends that defendant Norman Burger has failed to pay Compton approximately $180,000.00 to $200,000.00 he owes it and thereby has wrongfully retained PACA trust assets. *See* Inman's Second Amended Complaint [Court File #120 at ¶40]. Defendant Burger moves for partial summary judgment on that claim contending that these and all debts owed by Burger on transactions occurring before January 30, 1985 cannot be assets of the PACA trust in favor of Inman Farms since that is the date on which the trust in favor of Inman Farms was created. The statute creating the PACA trust in question provides that the following are assets of the trust:

> (2) Perishable agricultural commodities received by a commission merchant, dealer, or broker and all transactions and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the funds owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

7 U.S.C. §499e(c)(2). Assuming that Burger's debt to Compton was an account receivable resulting from potatoes received by Burger from Compton, t is the opinion of this court that if that indebtedness arose before January 30, 985, it could not possibly be said to be a part of the Inman trust assets since .hat trust was not then in existence. The language of the trust creating statute indicates that the trust created is limited to those suppliers and sellers involved in the particular transaction or transactions. I do not believe that the ,tatute would allow plaintiff to classify as "trust assets" an account receivable)f the broker/dealer which already existed at the time plaintiff's agricultural)roducts were received by the broker/dealer. Those assets are simply not rust assets of the unpaid seller under the language of the statute.

Accordingly, defendant Norman Burger's motion for partial summary judgment will be GRANTED. Plaintiff Inman will not be entitled to recover from Burger on any indebtedness arising from transaction occurring before January 30, 1985 since any resulting accounts receivable are not assets of Inman Farm's PACA trust.

IX.

Conclusion

In light of the foregoing, the following actions are hereby taken:

The motion for summary judgment of Wade Boswell [Court File #135] is GRANTED; the motion for summary judgment of Wade H. Boswell, M.D., PSC [Court File #136] is GRANTED; the motion for partial summary judgment of Wade Boswell, M.D., PSC Retirement Fund is GRANTED; the motion for summary judgment of defendant Valley Fidelity Bank & Trust Company [Court File #142] is DENIED; the motion for summary judgment of defendants Curtis, Simcox and Towne Lodge, Inc. [Court File #148] is DENIED; the motion for summary judgment of defendant First American National Bank [Court File #150] is GRANTED IN PART and DENIED IN PART consistent with this Memorandum Opinion; the Secretary of Agriculture's motion for summary judgment [Court File #153] is GRANTED IN PART and DENIED IN PART consistent with this Memorandum Opinion; the motion for summary judgment of plaintiff Inman Farms [Court File #158] is GRANTED IN PART and DENIED IN PART consistent with this Memorandum Opinion; the motion for summary judgment of defendant Michael Thigpen [Court File #175] is GRANTED; the motion for summary judgment of defendant M. S. Thigpen Produce Company, Inc. [Court File #178] is DENIED; and the motion for partial summary judgment of defendant Norman Burger [Court File #196] is GRANTED.

Order accordingly.

ORDER

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, it is hereby ORDERED that the motion for summary judgment of Wade Boswell [Court File #135] is GRANTED; the motion for summary judgment of Wade H. Boswell, M.D., PSC [Court File #136] is GRANTED; the motion for partial summary judgment of Wade Boswell, M.D., PSC Retirement Fund is GRANTED; the motion for summary judgment of defendant Valley Fidelity Bank & Trust Company [Court File #142] is DENIED; the motion for summary judgment of defendants Curtis, Simcox and Towne Lodge, Inc. [Court File #148] is DENIED; the motion for summary judgment of defendant First American National Bank [Court File #150] is GRANTED IN PART and DENIED IN PART consistent with this Memorandum Opinion; the Secretary of Agriculture's motion for summary

judgment [Court File #153] is GRANTED IN PART and DENIED IN PART consistent with this Memorandum Opinion; the motion for summary judgment of plaintiff Inman Farms [Court File #158] is GRANTED IN PART and DENIED IN PART consistent with this Memorandum Opinion; the motion for summary judgment of defendant Michael Thigpen [Court File #175] is GRANTED; the motion for summary judgment of defendant M. S. Thigpen Produce Company, Inc. [Court File #178] is DENIED; and the motion for partial summary judgment of defendant Norman Burger [Court File #196] is GRANTED.

MILTON POULOS, INC., Debtor. C & E ENTERPRISES, INC., d/b/a KOYAMA FARMS, a California corporation; PLEASANT VALLEY VEGETABLE COOPERATIVE, a California corporation; TEIXEIRA FARMS, INC., a California corporation; and MAULHARDT-STILES CO., a partnership, Plaintiffs, v. MILTON POULOS, INC., Defendant.
Bankruptcy Nos. LA 87-21451-NCA, M7-09606-NCA.
Decided September 30, 1988.

PACA statutory trust - Constitutionally valid - Enforceable in bankruptcy proceedings - Corpus of trust consists of all inventories and receivables of perishable agricultural commodities - Trust assets not part of bankruptcy estate.

The PACA's trust provisions are constitutional and the trust beneficiaries' rights are enforceable in bankruptcy proceedings. The PACA trust provisions are analogous to those of the Packers and Stockyards Act. The constitutionality of the PSA trust and the application of the PSA trust in bankruptcy proceedings have been challenged and upheld. The corpus of the PACA trust consists of all the debtor's inventory of perishable agricultural commodities, in raw or processed form, and to the products, receivables and proceeds derived therefrom. PACA trust assets are not part of the bankruptcy estate, but belong to the beneficiary of the trust.

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

CALVIN K. ASHLAND, Bankruptcy Judge.

MEMORANDUM OF DECISION

Creditors seek relief from the automatic stay and release of property not belonging to the estate based on a trust established by the Perishable Agricultural Commodities Act ("PACA"). Creditors claim the PACA trust assets are not part of the bankruptcy estate and are subject to distribution to trust beneficiaries outside the distribution contemplated in bankruptcy. Creditors also seek prejudgment and postjudgment interest, attorneys fees and reasonable costs as part of their trust claim.

FACTS

Milton Poulos Inc. ("MPI"), filed for relief under Chapter 11 of the Bankruptcy Code on October 21, 1987. MPI is the debtor in possession of a business engaged in purchasing fruit and vegetables from many growers and distributors. In order to satisfy unpaid claims, these suppliers now seek to assert their rights to assets established as a statutory trust by the Perishable Agricultural Commodities Act, 7 U.S.C. § 499e(c).

The creditors and their alleged trust claims are as follows: Koyama Farms, $100,283.70; Pleasant Valley Vegetable Co-op, $85,406.25; Teixeira Farms, Inc., $13,931.00; Maulhardt-Stiles Co., $19,976.15; Veg-a-mix, $133,673.60; and Florence Distributing, $128,311.69; (hereinafter "unpaid creditors").

Several other unpaid sellers with potential trust claims exist but are not participating in this motion. Mitsubishi Bank and American Commercial Bank, both secured creditors, as well as the debtor, oppose this motion contending, among other things, that the PACA trust is an impermissible secret lien.

ISSUES

I. Is the trust valid?

II. If so, what constitutes the corpus of the trust?

III. Are the trust assets part of the bankruptcy estate?

IV. Is the trust group entitled to relief from the automatic stay, the release of property not belonging to the estate, and the award of prejudgment and postjudgment interest, attorneys fees, and reasonable costs?

DISCUSSION

The PACA trust was established by Congress to protect sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received. The trust is a statutory trust which operates in favor of all unpaid suppliers, sellers, and agents ("sellers") of perishable agricultural commodities. Sellers, in order to preserve their interests in the trust, must give written notice to the debtor and file notice with the Secretary of Agriculture within a specified time period.

I. THE TRUST IS A VALID STATUTORY TRUST ENFORCEABLE IN BANKRUPTCY PROCEEDINGS.

A. *The PACA's Trust Provisions Are Constitutional.*

In 1984, Congress enacted a statute establishing a trust to protect sellers of perishable agricultural commodities. Congress found that:

> [A] burden on commerce in perishable agricultural commodities is caused by *financing arrangements* under which commission merchants, dealers, or brokers, *who have not made payment for perishable*

agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, *encumber or give lenders a security interest in, such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products,* and that such arrangements are contrary to the public interest.

7 U.S.C. § 499e(c)(1) (emphasis added).

In 1976, Congress, after making a similar finding with regard to commer in livestock, established a statutory trust under the Packers and Stockyar Act, 7 U.S.C. § 196 ("PSA"). The PACA's legislative history indicates th courts are to look to case law developed under the PSA for guidance as proceedings arising under the PACA. *In re Fresh Approach, Inc.*, 51 B.R. 41 419, n. 4 (Bankr. N.D. Tex. 1985). The PSA's trust provisions state that:

All livestock purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, *shall be held by such packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers.*

7 U.S.C. § 196(b) (emphasis added). The PACA's trust provisions a essentially identical to those establishing the PSA trust. *See* 7 U.S.C. 499e(c)(2).

The constitutionality of the PSA trust has been challenged and upke *Fillippo v. S. Bonaccurso & Sons, Inc.*, 466 F.Supp. 1008 (E.D. Pa. 1978); *re Frosty Morn Meats, Inc.*, 7 B.R. 988 (Bankr. M.D. Tenn. 1980). In *Fillipp* the court, responding to creditor Continental Bank's attack on t constitutionality of the PSA, stated that:

[T]he Court finds no constitutional impediment to Congress' action in creating the statutory trust of 7 U.S.C. § 196. In September, 1976, Congress amended the [PSA] to create a trust for unpaid sellers of livestock. *The Bank's security interest did not attach until its debtor,* SBI [i.e., S. Bonaccurso & Sons, Inc.], *acquired rights in the collateral,* viz., in June, 1977, when plaintiff transferred livestock to SBI's possession. Pa. Stat. Ann. tit. 12A § 9-203(1). *At the very same moment, the livestock and any proceeds therefrom became impressed with a superseding statutory trust for plaintiff's benefit arising under federal law.* The Bank's security interest was *limited at all times* by Pa. Stat. Ann. tit. 12A § 9-104. The Packers and Stockyards Act, 7 U.S.C. § 196, "governs the rights of parties to and third parties affected by transactions in particular types of property." *Pennsylvania's commercial law impaired Continental Bank's rights to collateral* (livestock inventory, receivables and other proceeds therefrom) *which is excluded from Article 9 of Pennsylvania's version of the Uniform Commercial Code. Congress denied no process due and impaired no obligation of contract* but merely used the exclusion of the Uniform Commercial Code's § 9-104(a) to subject a particular type of property, livestock, bought and

> sold in interstate commerce to a statutory trust and thereby to a federal schedule of priorities among claimants.

Id. at 1012, n. 2 (emphasis added).

The *Fillippo* court's constitutional analysis is applicable to cases arising in California. California's version of the Uniform Commercial Code ("UCC") states that the UCC's secured transactions division (i.e., Article 9 of the UCC) *does not apply* "to a security interest *subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property.*" Cal. Com. Code § 9104 (West Supp. 1988) (emphasis added). Since California's version of U.C.C. § 9-104 is essentially identical to Pennsylvania's version, the Fillippo court's analysis is applicable in California cases.

The constitutionality of a PSA trust was again challenged in *Frosty Morn*. In that case, the district court stressed the federal pre-emption doctrine and stated that the trust did not "violate any constitutionally protected rights of holders of liens on assets of meatpackers." *Id.* at 1003. Therefore, sine (1) the PSA's trust provisions are constitutional and (2) the PACA's trust provisions are essentially identical to those of the PSA, the PACA trust provisions are constitutional.

B. *PACA Trust Beneficiaries' Rights are Enforceable in Bankruptcy Proceedings.*

In *First State Bank v. Gotham Provision Co. (In re Gotham Provision Co.)*, 669 F.2d 1000 (5th Cir. Unit B), *cert. denied*, 459 U.S. 858, 103 S.Ct. 129, 74 L.Ed.2d 111 (1982), the court upheld the application of the PSA trust in bankruptcy proceedings. The court stated that:

> According to general principles of trust law, . . ., where trust funds are commingled with funds not subject to the trust, a lien on the entire commingled fund exists for the benefit of the beneficiaries of the trust, and those who receive a transfer of assets from the commingled fund with actual or constructive notice of the trust are subject to the lien. Scott, *The Law of Trusts*, §§ 219.4, 519.1 (3d ed. 1967). In this case, the Bank had constructive notice of the trust because a federal statute created the trust.

Id. at 1011.

Furthermore, § 541 of the Bankruptcy Code specifically excludes PSA (and by analogy PACA) trust assets from the bankruptcy estate. Section 541(d) states that:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, becomes property of

> the estate under subsection (a)(1) or (2) of this section *only to the extent of the debtor's legal title to such property*, but not to the extent of any equitable interest in such property that the debtor does not hold

11 U.S.C. § 541 (emphasis added).

Finally, section 541's legislative history indicates that PSA and PACA trust assets are not part of the bankruptcy estate.

> Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in a constructive trust for the person to whom the bill was owed. This section and proposed 11 USC 545 also *will not affect* various statutory provisions that give a creditor of the debtor a lien that is valid *outside as well as inside bankruptcy, or that creates a trust fund for the benefit of a creditor of the debtor. See Packers and Stockyards Act § 206, 7 USC 196.*

H.R. Rep. No. 595, 95th Cong., 1st Sess. 368 (1977), U.S. Code Cong. Admin. News 1978, pp. 5787, 6324; S. Rep. No. 989, 95th Cong., 2d Sess. 83 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5868 (emphasis added).

The preceding discussion leads to the conclusion that the PACA is a valid statutory trust enforceable in bankruptcy proceedings. First, Congress directed courts to look to case law developed under the PSA for guidance, to proceedings arising under the PACA. Second, the legislative history of 541, together with relevant case law, indicate the PSA is a valid statutory trust enforceable in bankruptcy proceedings. Finally, the PACA's trust provisions are essentially identical to the PSA's trust provisions. Therefore, by analogy the PACA is a valid statutory trust enforceable in bankruptcy proceedings. The court in *Fresh Approach* clearly stated the rationale for permitting the enforceability of statutory trusts, like the PSA and the PACA, in a bankruptcy proceeding:

> It must be remembered that PACA was not enacted to protect those in [d]ebtor's shoes, but rather to prevent the chaos and disruption in the flow of perishable agricultural commodities sure to result from an industry-wide proliferation of unpaid obligations. While in isolation this may seem a harsh course to follow, in the macroeconomic sense PACA serves to ensure continuity of payment and therefore survival of the industry. Congress has plainly decided it would be less disastrous to risk the liquidation of a single purchaser than to threaten the entire production chain with insolvency. It is not the function of this [c]ourt to pass upon the wisdom of that decision.

Id. at 420.

II. THE TRUST CONTAINS ALL INVENTORIES OF FOOD OR OTHER PRODUCTS DERIVED FROM PERISHABLE AGRICULTURAL COMMODITIES, AND ANY RECEIVABLES OR PROCEEDS FROM THE SALE OF SUCH COMMODITIES OR PRODUCTS.

Title 7 U.S.C. § 499e(c)(2) states that:

> Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and *all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products*, shall be held by such commission merchant, dealer, or broker *in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing* in connection with such transactions *has been received* by such unpaid suppliers, sellers, or agents.

7 U.S.C. § 499e (emphasis added).

Similarly, 7 C.F.R. § 46.46 states that the corpus of the trust "is made up of perishable agricultural commodities received in all transactions, all inventories of food or other products derived from such perishable agricultural commodities, and *all receivables or proceeds from the sale of such commodities and food or products derived therefrom*." 7 C.F.R. § 46.46 (1988) (emphasis added). Therefore, the trust consists of perishable agricultural commodities and any food or product derived from the agricultural commodity.

In addition, trust assets do not have to be separated from the debtor's other assets nor do they have to be labeled as "trust assets." *See Fresh Approach* at 422. The regulations state that "[t]rust assets are to be preserved as a nonsegregated 'floating' trust. Commingling of trust assets is contemplated." 7 C.F.R. § 46.46 (1988). Furthermore, the debtor or bankruptcy trustee, rather than the trust beneficiary, is responsible for determining which assets, if any, are not subject to the trust. *Fresh Approach* at 422; *Frosty Morn* at 1013. Therefore, the trust applies to all of the debtor's inventory of perishable agricultural commodities, in raw or processed form, and to the products, receivables, and proceeds derived from such commodities.

III. PACA TRUST ASSETS ARE NOT PART OF THE BANKRUPTCY ESTATE.

"Property held in trust by a bankruptcy debtor belongs to the beneficiary of the trust." *In re Bullion Reserve of North America*, 836 F.2d 1214 (9th Cir.), *cert. denied sub nom., Bozek v. Danning*, ___ U.S. ___, 108 S.Ct. 2824, 100 L.Ed.2d 925 (1988). Furthermore, case law interpreting § 541 of the Bankruptcy Code has consistently held that PACA trust assets are not part of

the bankruptcy estate. *Fresh Approach*; *In re Monterey House*, 71 B.R. 244 (Bankr. S.D. Tex. 1986); *In re W.L. Bradley*, 75 B.R. 505 (Bankr. E.D. Pa. 1987); *In re Super Spud, Inc.*, 77 B.R. 930 (Bankr. M.D. Fla. 1987) and *In re Al Nagelberg & Co., Inc.*, 84 B.R. 19 (Bankr. S.D.N.Y. 1988). Therefore, PACA trust assets are not part of the bankruptcy estate.

IV. THE COURT GRANTS THE TRUST GROUP'S MOTION FOR RELIEF FROM AUTOMATIC STAY AND RELEASE OF PROPERTY NOT BELONGING TO THE ESTATE.

The PACA requires unpaid sellers to preserve their trust benefits by giving *written notice*, to both the Secretary of Agriculture *and* the debtor, of their intent to preserve the benefits of the trust. 7 U.S.C. § 499e(c) (emphasis added). The regulations state that:

> Notice of intent to preserve benefits under the trust must be in writing, given to the debtor, and filed with the Secretary *within 30 calendar days*: (i) After expiration of the time prescribed by which payment must be made pursuant to regulation. (ii) *After expiration of such other time by which payment must be made as the parties have expressly agreed to in writing* before entering into the transaction, . . . or (iii) After the time the supplier, seller or agent has received notice that a payment instrument promptly presented for payment has been dishonored.

7 C.F.R. § 46.46 (1988) (emphasis added). Thus, unpaid sellers can enforce their beneficiary rights under the PACA trust only if they give notice of their intent to preserve their trust benefits to both the Secretary of Agriculture *and* the debtor. *In re Marvin Properties, Inc.*, 76 B.R. 150 (Bankr. 9th Cir. 1987), *aff'd*, 854 F.2d 1183 (9th Cir. 1988). Thus, the unpaid creditors that have duly perfected their trust benefits by filing the requisite notice as determined by the U.S. Department of Agriculture have enforceable claims.

Finally, the court denies the award of any interest, fees and costs. Assuming the court has the equitable power to grant the unpaid creditors' claims, the court has determined that awarding interest, fees, and costs would unfairly deplete the bankruptcy estate at the expense of all other creditors. Therefore, the unpaid creditors are only entitled to enforcement of their rights established by the PACA.

CONCLUSION

The PACA establishes a valid statutory trust in favor of unpaid sellers of perishable agricultural commodities. The trust consists of all inventories of food or other products derived from perishable agricultural commodities and any receivables or proceeds from the sale of such commodities or products. It does not matter whether the trust beneficiary or another seller was the source of the inventory or proceeds, the trust applies to *all* the debtor's produce related inventory and proceeds. Trust assets are not a part of the

bankruptcy estate. The unpaid creditors that have complied with the statutory notice requirements are entitled to enforcement of their rights established by the PACA. The court denies the award of any interest fees and costs.

This memorandum of decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052. A separate order will be entered.

MELVYN SIEGEL, Petitioner v. RICHARD E. LYNG, Secretary of Agriculture, United States Department of Agriculture, et al. and UNITED STATES OF AMERICA.
No. 84-1047.
Decided July 12, 1988.

PACA employment bar applicable to persons "reasonably connected" to violators - No violation of Due Process nor the Bill of Attainder Clause.

PACA employment bar was intended to bar temporarily persons "reasonably connected" to PACA violators from any employment with employer-licensees. Non-PACA work for diversified PACA licensees is not exempt from the employment bar. The employment restrictions do not violate the Bill of Attainder Clause because the statutory presumption is both rebuttable in adjudicatory proceedings and nonpunitive in nature.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Before WALD, Chief Judge, ROBINSON and STARR, Circuit Judges.
Opinion for the Court filed by Chief Judge WALD.
WALD, Chief Judge:

PETITION FOR REVIEW OF ORDERS
OF THE DEPARTMENT OF AGRICULTURE

I. INTRODUCTION

Melvyn Siegel, petitioner, was President, Director, and majority shareholder of Finer Foods Sales Company (Finer Foods). Upon citation for flagrant, repeated violations of the Perishable Agricultural Commodities Act, as amended (Act or PACA), 7 U.S.C. §§ 499a-499s, *see Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774 (D.C. Cir. 1983) (affirming Secretary of Agriculture's decision that Finer Foods violated Act), Finer Foods sold all its assets to L.M. Sandler & Sons, Inc. (Sandler & Sons). Sandler & Sons also hired Siegel.

The present action involves the subsequent efforts by the Agriculture Department's Agricultural Marketing Service, Fruit and Vegetable Division (AMS) to enforce PACA Section 8(b) employment restrictions against Siegel

because of his being "responsibly connected" with Finer Foods. Siegel challenges his one year employment bar on statutory grounds as well as on the ground that the statute violates Due Process and Bill of Attainder proscriptions. Because we hold that neither constitutional argument is valid and that the Department construction of PACA is correct, we affirm the employment bar that was issued pursuant to proper procedures.

II. BACKGROUND

A. *Legislative Background*

PACA was enacted in 1930 as a licensing scheme to regulate transactions in perishable agricultural commodities. The legislation was prompted by unfair dealer practices in the industry, which harmed growers and shippers alike. The statutory mechanism erected to correct these abuses was succinctly described by this Court in *Quinn v. Butz*, 510 F.2d 743, 746-47 (D.C. Cir. 1975), as follows:

> In broad outline, the Act regulates the shipment of perishable agricultural commodities in interstate and foreign commerce through a system of licensing and administrative supervision of the conduct of licensees. Commission merchants, dealers and brokers in such commodities must obtain from the Secretary of Agriculture a license as a precondition to doing business.[1] By Section 2, licensees are forbidden to engage in specified unfair practices,[2] which include failure to make full payment promptly for commodities dealt in.[3] An unfair practice subjects the licensee to liability to the injured party for damages, recoverable either in a proceeding before the Secretary or by suit in court.[4] The Secretary is authorized to investigate complaints of unfair practices[5] and, finding a violation, to issue a reparation order requiring the offending licensee to pay damages.[6] Failure to obey the

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[1] [Footnotes renumbered] Perishable Agricultural Commodities Act §§ 3, 4, 7 U.S.C. §§ 499c, 499d (1970).

[2] *Id.* § 2, 7 U.S.C. § 499b (1970).

[3] *Id.* § 2(4), 7 U.S.C. § 499b(4) (1970).

[4] *Id.* § 5, 7 U.S.C. § 499e (1970).

[5] *Id.* § 6, 7 U.S.C. § 499f (Supp. III 1973).

[6] *Id.* § 7(a), 7 U.S.C. § 499g(a) (Supp. III 1973).

order automatically suspends the license during noncompliance.[7]

The Secretary is also empowered to suspend or revoke licenses for unfair practices,[8] and to limit employment within the industry of those who violate the Act and those who are "responsibly connected" with violators.[9] Section 8(b) of the Act, in respects highly relevant to this case, provides that except with the Secretary's approval no licensee may employ any person, or anyone "responsibly connected" with a person, whose license has been revoked or is currently suspended, or who has been found to have committed any flagrant or repeated violation of Section 2, or against whom there is an unpaid reparation order issued within two years.[10] Section 1(9), another provision bearing importantly on this case, specifies that a person is "responsibly connected" with an offending licensee if he is affiliated with the licensee

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[7] "Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: *Provided,* That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay; unless prior thereto the judgment of the court has been satisfied." *Id.* § 7(d), 7 U.S.C. § 499g(d) (1970).

[8] "Whenever (a) the Secretary determines, as provided in [§ 6], that any commission merchant, dealer, or broker has violated any of the provisions of [§ 2], or (b) any commission, merchant, dealer, or broker has been found guilty in a Federal court of having violated [§ 14(b)], the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender. . . ." *Id.* § 8(a), 7 U.S.C. § 499h(a) (1970).

[9] *Id.* § 8(b), 7 U.S.C. § 499(b) (1970), which in relevant part provides:

> Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person--(1) whose license has been revoked or is currently suspended by order of the Secretary; (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title. . . .

[10] See [sic] note [9] *supra*. The Secretary is authorized to approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation award, or after one year following the revocation or finding of flagrant or repeated violation, upon the posting of bond. *Id.* The Secretary may also approve employment without bond after the expiration of two years from the effective date of the disciplinary order. *Id.*

as officer, director or holder of more than 10% of its outstanding stock.[11]

Id. at 746-47.

B. *Factual Background*

The factual history of the case is set out in *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774 (D.C. Cir. 1983). Briefly, petitioner-Siegel was President, Director, and majority shareholder of Finer Foods, a company adjudged to have committed flagrant and repeated violations of PACA. *Id.*; *see also* Joint Appendix (J.A.) at 2, 35. Finer Foods' assets were sold to Sandler & Sons in July, 1979, and on August 1, Sandler & Sons hired Siegel as an employee. Sandler & Sons is also a PACA licensee.

Because AMS was pursuing charges of PACA violations by Finer Foods, the agency notified Sandler & Sons that Siegel's responsible connection to Finer Foods would disqualify him from industry employment for one year. *See id.* at 2-4. Once Finer Foods was found to have violated the Act, AMS sent formal notice of Siegel's employment ineligibility. *See id.* at 27, 35. Siegel did not make timely contest of this responsible connection conclusion. Instead, on January 4, 1984, Siegel filed the present opposition to this employment restriction, claiming that the bar violates statutory and constitutional protections.

III. ANALYSIS

This Court's line of cases involving PACA employment restrictions, culminating in the recent *Veg-Mix, Inc. v. United States Department of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987), is largely dispositive of Siegel's statutory challenge to his bar from *any* employment with Sandler & Sons and also of his Bill of Attainder attack on the "responsibly connected" classification itself.

A. *Employment Bar*

Siegel's statutory challenge to PACA--his objection to a sanction that forbids employment by a licensee even in positions unrelated to the PACA regulatory scheme--must fail as contrary to express statutory language. Siegel urges this Court to exempt non-PACA work for diversified PACA licensees from the employment bar against sanctioned persons. *See* Brief of Petitioner at 20-27. Yet section 499h(b) states that

> *no licensee shall employ* any person, or any person who is or has been responsibly connected with any person--(1) whose license has been

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[11] "The term 'responsibly connected' means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. . . ." *Id.* § 1(9), 7 U.S.C. § 499a(9) (1970).

> revoked or is currently suspended by order of the Secretary; (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title. . . .

7 U.S.C. § 499h(b) (emphasis added). Finer Foods was found by this court to have committed such flagrant and repeated violations. *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774 (D.C. Cir. 1983). Not only is section 499h(b)'s employment bar phrased as an absolute, but also the Act elsewhere defines employment as "*any affiliation* of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment." 7 U.S.C. § 499a(10) (emphasis added). This Court in *Quinn* explicitly remarked that Congress had approved a "'clear and equitable' rule that denied him [PACA violator] *any* employment, for the pertinent period, rather than require a new determination of precisely which positions were closed." 510 F.2d at 756 (emphasis added) (footnote omitted).

Indeed, Congress amended the Act in 1963 precisely to clarify this comprehensive bar. Immediately prior to the 1962 amendments, the Secretary was authorized to sanction licensees only when these employers hired a violator (or responsibly connected person) for a "responsible position." Because this determination proved difficult to administer, the qualification was deleted altogether in 1962. Congress explained the deletion with statements that prove an intent to incorporate an expansive employment bar. The House Committee on Agriculture, for example, stated:

> At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship with the licensee.

H.R. Rep. No. 1546, 87th Cong., 2d Sess. 8 (1962), U.S. Code Cong. & Admin. News 1962, p. 2749. Likewise an earlier report from the same committee observed:

> Experience has demonstrated that it is not possible to obtain satisfactory evidence to prove that a person holds a 'responsible' position if his employer and he want to hide their working arrangement. . . . It is believed that the limitations on employment should apply to anyone on the payroll of a licensee with the standard debarment periods or bonding requirements dependent on the nature of the violation.

House Committee on Agriculture Hearings on Perishable Agricultural Commodities, 87th Cong., 1st Sess. 15 (1961). This investigatory difficulty, compounded in cases where, as here, the new employer-licensee has acquired all the assets of the violating company, confirms the reasonableness of Congress' amendment barring *any* employment for the proscribed period.

B. *Bill of Attainder*

Siegel attacks the PACA employment bar as contrary to the Bill of Attainder Clause, Article I, § 9 of the United States Constitution.[12] However, the very definition of a Bill of Attainder--a "'law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial,'" *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-47, 104 S.Ct. 3348, 3351-52, 82 L.Ed.2d 632 (1984) (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 97 S.Ct. 2777, 2803, 53 L.Ed.2d 867 (1977))--points to its inapplicability to PACA's employment restrictions. This provision does not infringe the Bill of Attainder Clause because the statutory presumption both is rebuttable in adjudicatory proceedings and also is nonpunitive in nature.

Broadly speaking, the Bill of Attainder Clause is a further constitutional iteration of the separation of powers logic that structures our government. Whereas Congress may properly legislate to bar persons with certain characteristics from specific activities, the task of determining who possesses these characteristics is generally assigned to the judiciary. *See United States v. Brown*, 381 U.S. 437, 454 n. 29, 85 S.Ct. 1707, 1718 n. 29, 14 L.Ed.2d 484 (1965). Section 499h(b) of the PACA describes the characteristic that may disqualify persons from industry employment as *responsible connection* with entities that violate the Act. Nonetheless, as construed by this Court, characterization as a "responsibly connected" person is rebuttable, not absolute. *See Quinn*, 510 F.2d at 751. In that case, this Court required corporate veil piercing on the issue of responsible connection; ultimately, the Court exonerated petitioner-Quinn as not having been responsibly affiliated with the culpable company because his officership was shown to be entirely nominal.

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[12] Siegel's Due Process challenge, as noted at oral argument, parallels his Bill of Attainder argument. Because we adhere to the *Quinn* characterization of the employment bar as a rebuttable presumption, we do not need to consider case law overturning irrebuttable presumptions. Numerous courts have affirmed Congress' rational purpose under the Commerce Clause to regulate the free flow of perishable agricultural commodities through PACA restrictions. *See, e.g., Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 526 (3d Cir. 1950); *cf. Mobile, J. & K. C.R. Co. v. Turnipseed*, 219 U.S. 35, 43, 31 S. Ct. 136, 138, 55 L.Ed. 78 (1910) (legislative presumption of fact must be based on rational inference).

This Court twice has expressly reaffirmed this reading of section 499a(9). *See Veg-Mix, Inc. v. United States Department of Agriculture*, 832 F.2d 601, 611 (D.C. Cir. 1987); *Minotto v. United States Department of Agriculture*, 711 F.2d 406, 408 (D.C. Cir. 1983).[13] Petitioner erroneously attempts to minimize this Court's departure from other circuits' irrebuttable presumption analysis of section 499a(9) by arguing that *Martino v. United States Department of Agriculture*, 801 F.2d 1410 (D.C. Cir. 1986), permits no consideration of matters beyond the *bona fides* of the persons in question. *See* Reply Brief of Petitioner at 3-4 n. 1. However, *Martino* itself states that in a hearing, the charged person may show that she "*somehow* . . . does not belong in any of the statutory categories of responsible connection. . . ." *Martino*, 801 F.2d at 1414 (emphasis added). More decisive, in *Veg-Mix*, this Court expressly applied our decisional law's culpability concept, noting *Minotto's* rule that a "'finding of liability under section 499h of the Act must be premised upon personal fault or the failure to "counteract or obviate the fault of others."'" *Veg-Mix*, 832 F.2d at 611 (quoting *Minotto*, 711 F.2d at 408 (quoting *Quinn*, 510 F.2d at 756)) (footnote omitted).

The instant case involves a record that fully supports the Secretary's determination that Siegel was personally at fault or had the capacity to prevent others' fault, hence was "responsibly connected" with Finer Foods during the time when the company violated the Act. *Cf. Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) ("it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act"), *cert. denied*, 389 U.S. 835, 88 S.Ct. 43, 19 L.Ed.2d 96 (1967). *See generally, Community Nutrition Institute v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985) (agency may dispense with hearing when no material issue of fact exists), *cert. denied*, 475 U.S. 1123, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986). Siegel was President and Director of the company throughout the period when violations occurred. this is dissimilar to the nominal vice president in *Quinn*, to the clerical employee designated director in *Minotto*, or to petitioner-Harris' absence from the violating company in *Veg-Mix*. Siegel also held three-fourths of the company's stock. By contrast, petitioners in *Quinn* and *Minotto* possessed no shares at all. Most clearly in *Martino*, this Court held that approximately twenty per cent stock ownership would suffice to make a person accountable for not controlling delinquent management. *See also Veg-Mix*, 832 F.2d at 611 ("Majority ownership obviously suffices [for a finding of responsible connection].") In his capacity as President and Director, Siegel

[13] Petitioner's reference to contrary interpretations of PACA by other circuits is inapposite *See, e.g., Pupillo v. United States*, 755 F.2d 638, 643-44 (8th Cir. 1985) (section 499a(9) is per s rule of accountability); *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966) (same).

himself was the delinquent management. Moreover, his was the majority shareholder voice. Thus his "'actual, significant nexus with the violating company'" is uncontrovertible, *Martino*, 801 F.2d at 1414 (citing *Minoito*), indeed, the nexus is precisely that envisioned by Congress when it employed the phrase "responsibly connected."

Also determinative, we find that section 499h(b) does not inflict "punishment" forbidden by the Bill of Attainder Clause, but rather is a statutory civil penalty to assist regulatory enforcement of the Act. *See Zwick v. Freedman*, 373 F.2d 110, 119-20 (2d Cir.) (section 499h(b) is not Bill of Attainder), *cert. denied*, 389 U.S. 835, 88 S.Ct. 43, 19 L.Ed.2d 96 (1967); *see also Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966) (section 499h(b) is not unconstitutional). The line of Supreme Court law on the Bill of Attainder Clause indicates that legislation will survive Bill of Attainder attack if the statute furthers nonpunitive legislative purposes. *See Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852, 104 S.Ct. 3348, 3355, 82 L.Ed.2d 632 (1984) (inquiry is whether the law under challenge, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes") (citing) *Nixon v. Administrator of General Services*, 433 U.S. 425, 475-76, 97 S.Ct. 2777, 2806-07, 53 L.Ed.2d 867 (1977); *De Veau v. Braisted*, 363 U.S. 144, 160 80 S.Ct. 1146, 1155, 4 L.Ed.2d 1109 (1960) ("The question . . . is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation. . . ."); *Hawker v. New York*, 170 U.S. 189, 196, 18 S.Ct. 573, 576, 42 L.Ed. 1002 (1897) (same).

Legitimate justifications for the employment restriction, noted earlier, are evident, indeed are paramount, both in the AMS's present use of the temporary bar, and also in the legislative record relevant to the 1962 amendments. *See supra* Section III.A; *see also Whitney v. Heckler*, 780 F.2d 963, 974 (11th Cir. 1986) (approving *Zwick* finding that PACA employment restrictions are reasonable regulatory-enforcement scheme, hence escape Bill of Attainder prohibition). This Court recently echoed Congress' express purpose behind the PACA enforcement regime, including the employment restrictions: namely, that the Act's "special sanctions against dishonest or unreliable dealing" "help instill confidence in parties dealing with each other on short notice, across state lines and at long distances. . . ." *Veg-Mix*, 832 F.2d at 604.[14] This legislative and executive resolve to guarantee that PACA

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[14] Note that Congress employs a "responsibly connected" classification, coupled with *Quinn*-type hearings, to determine business unfitness in numerous regulated industries. *See, e.g.*, 21 U.S.C. § 467 (government may withdraw, indefinitely, inspection services to entities in poultry industry where persons "responsibly connected" to entity are found to have violated food laws); 1 U.S.C. § 671 (same--meat food products industry); 21 U.S.C. § 1047 (same--egg products industry); 7 U.S.C. § 86 (same--grain products industry).

ısactions by firms employing persons "responsibly connected" to disciplined nsees be conducted with easy-to-monitor, scrupulous compliance with the is ample justification for the temporary employment bar.

IV. CONCLUSION

Because we find no legal error in the Secretary's conclusion that Congress nded to bar temporarily persons "responsibly connected" to PACA ators from *any* employment with employer-licensees, and because we ide that section 499h(b)'s employment restrictions as applied to petitioner-gel survive Due Process and Bill of Attainder challenges, we deny Siegel's tion for review.

In re: B & L PRODUCE, INC., a/t/a B & L PRODUCE COMPANY and MARK R. LINDSTROM.
PACA Docket No. D 88-516.
Decision and Order filed August 12, 1988.

Failure to make full payment promptly - Failure to maintain sufficient trust assets.

Sharlene Lassiter, for Complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as PACA, instituted by a complaint filed on February 24, 1988, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint contains the allegations that during the period August 1986 through March 1987, respondent B & L Produce, under the direction, management and control of respondent Lindstrom, purchased, received and accepted in interstate commerce, from 19 sellers, 56 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or the outstanding balances due, in the amount of $149,984.45.

A copy of the complaint was served on respondents. Neither respondent filed an answer to the complaint, which constitutes an admission of the material allegations of fact contained therein, and a waiver of hearing, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.139). Consequently, complainant filed a motion for the issuance of a decision. Therefore, the following Decision and Order is issued without further investigation or hearing.

Findings of Fact

1. B & L Produce, Inc., a/t/a B & L Produce Company, hereinafter referred to as respondent B & L Produce, is a corporation whose business mailing address was 20233 80th Avenue, Kent, Washington 98032.

2. Mark Lindstrom, hereinafter referred to as respondent Lindstrom, is an individual whose mailing address is 2700 S.E. Arthur Court, Port Orchard, Washington 98866.

3. Respondent Lindstrom is the person responsible for the direction, management and control of respondent B & L Produce and the *alter ego* of respondent B & L Produce.

4. Pursuant to the licensing provisions of the PACA, license number 870417 was issued to Respondent B & L Produce on December 16, 1986.

This license terminated on December 16, 1987, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499b(4)), when respondent B & L Produce failed to pay the required annual renewal fee.

5. As more fully set forth in paragraph 5 of the complaint, during the period August 13, 1986 through March 9, 1987, respondent B & L Produce purchased, received and accepted in interstate commerce, from 19 sellers, 56 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, o the outstanding balances due, in the total amount of $149,984.45.

6. Pursuant to Section 5(c) of the PACA (7 U.S.C. § 499e(c)), a trust was created with respect to the unpaid transactions set forth in paragraph 5 of the complaint. Respondent B & L Produce, under the direction, management and control of respondent Lindstrom, failed to maintain sufficient assets in trust as required by Section 5(c) of the PACA (7 U.S.C. § 499e(c)).

7. On April 16, 1987, Respondent B & L Produce, filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq.*) in the United States Bankruptcy Court for the Western District of Washington, which has been designated as Case No. 87-02981.

Conclusions

Respondent Lindstrom is the *alter ego* of respondent B & L Produce.

Respondent B & L Produce's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 5, above, and failure to maintain sufficient assets in trust as required by Section 5(c) of the PACA (7 U.S.C. § 499e(c)), under the direction, management and control of respondent Lindstrom, constitutes willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondents B & L Produce, Inc., a/t/a B & Produce Company, and Mark Lindstrom have committed willful, flagrant a repeated violations of Section 2 of the PACA (7 U.S.C. § 499b), and the fac and circumstances set forth above, shall be published.

This Order shall take effect on the eleventh day after this Decisic becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA this Decision will become final without further proceedings thirty-five day: after service, unless appealed to the Secretary by a party to the proceedin within thirty days after service as provided in sections 1.139 and 1.145 of th Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order as to Mark R. Lindstrom became final September 23, 1988.--Editor.]

In re: CARPENITO BROTHERS, a/t/a 5 C's FRUIT and PRODUCE.
PACA Docket No. 2-6846.
Order filed September 1, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER LIFTING STAY

Judicial review having been completed, my order of April 28, 1987, staying imposition of the license revocation provision of my order dated March 26, 1987, is hereby lifted. The suspension shall commence on the 10th day after service of the order on respondent.

Copies of this order shall be served upon the parties.

In re: MAC PRODUCE, INC.
PACA Docket No. D 88-523.
Decision and Order filed August 5, 1988.

Failure to make full payment promptly--Failure to maintain sufficient trust assests--Failure to pay required annual license fee.

Andrew Y. Stanton, for Complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on April 18, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January 1986 through March 1987, respondent purchased, received and accepted, in interstate and foreign commerce, from 22 sellers, 273 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $273,222.83, and failed to maintain sufficient assets in trust.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the

motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Mac Produce, Inc., is a corporation, whose address is 2928 N.E. 63rd, Oklahoma City, Oklahoma 73108.

2. Pursuant to the licensing provisions of the Act, license number 821235 was issued to respondent on June 7, 1982, was renewed annually, but terminated on June 7, 1987, pursuant to section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraphs 5 and 6 of the complaint, during the period January 1986 through March 1987 respondent purchased, received and accepted in interstate and foreign commerce, from 22 sellers, 273 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $273,222.83, and failed to maintain sufficient assets in trust.

Conclusions

Respondent's failure to make full payment promptly with respect to the 273 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), and a failure to maintain sufficient assets in trust, in violation of section 2 of the Act, for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final September 28, 1988.--Editor.]

In re: MCQUEEN BROTHERS PRODUCE COMPANY, INC.
PACA Docket No. 2-6956.
Decision and Order filed September 8, 1988.

Failure to make full prompt payment - Failure to maintain sufficient trust assets - Responsible hearsay admitted - Payment as mitigating circumstance.

The Judicial Officer affirmed Judge McGrail's decision and order finding that respondent has committed willful, flagrant and repeated violations of § 2 of the Act by failing to make full payment promptly to 20 sellers for 71 lots of produce from February 1985 through April 1985, totaling $395,687.18, and by failing to maintain sufficient assets in trust to meet its obligations. The evidence shows that respondent is subject to license under the PACA because the majority of the purchases totaled 1 ton or more in weight, and the transactions were in interstate commerce. Respondent's bankruptcy documents, received in evidence, show that the payment failures of Al McQueen & Sons are the debts of respondent. When transportation charges are implicit in a transaction, the payment of such charges becomes an undertaking in connection with the transaction, within the meaning of § 2(4) of the Act. Responsible hearsay is admissible in administrative proceedings. Payment within 10 days is required in the absence of a written agreement. Only if full payment is made before the hearing, along with present compliance with the PACA, will payment be considered a mitigating circumstance. The proof far surpasses the preponderance of the evidence, which is all that is required. The ALJ's findings of fact are given great weight by the Judicial Officer. Respondent's arguments are similar to those rejected in *In re B.G. Sales Co.*, 44 Agric. Dec. 2021 (1985).

Andrew Y. Stanton, for Complainant.
A. Vance McQueen, for Respondent.
Initial decision issued by Edward H. McGrail, Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),[*] in which Administrative Law Judge Edward H. McGrail (ALJ) filed an initial Decision and Order on April 6, 1987, finding that respondent has committed willful, flagrant and repeated violations of § 2 of the Act by failing to make full payment promptly to 20 sellers for 71 lots of produce from February 1985 through April 1985, totaling $395,687.18, and by failing to maintain sufficient assets in trust to meet its obligations.

[*] *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, 1 Davidson, Agricultural Law, ch. 4 (1981 and 1987 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

On May 7, 1987, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).** On June 12, 1987, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter the "PACA"), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151; hereinafter the "Rules of Practice"). The proceeding was instituted by a complaint filed on September 16, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleged that the respondent violated section 2 of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly of the agreed purchase prices to 20 sellers for 71 lots of perishable agricultural commodities, for a total of $395,687.18. The complaint also alleged that respondent had violated sections 2(4) and 5(c) of the PACA (7 U.S.C. §§ 499b(4) and 499e(c)) by failing to maintain sufficient assets in trust to meet its obligations. Respondent filed an answer on November 5, 1985, in which it denied violating all substantive allegations in the complaint.

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

An oral hearing was held on January 13, 1987, before the undersigned in Indianapolis, Indiana. Complainant was represented by Andrew Y. Stanton Esq., Office of the General Counsel, U.S. Department of Agriculture Washington, DC 20250. Respondent was represented by A. Vance McQueen Esq., Shelbyville, Indiana. Briefs which were filed on February 10, 1987, by complainant and on March 23, 1987, by respondent, as well as complainant's reply brief, filed on March 27, 1987, have been duly considered. For convenience, the applicable Statutes and Regulations are set forth in Appendix [A] hereto.

Findings of Fact

1. Respondent is an Indiana corporation whose address is R.R. #1, Box 402, Flat Rock, Indiana 47234 (Complaint, para. 2; Answer, para. 2).

2. Respondent has never been licensed under the PACA. However, at the time of the violations alleged in the complaint, respondent was operating subject to license as a produce dealer, pursuant to section 1(6) of the PACA (7 U.S.C. § 499a(6)), and section 46.2(x) of the regulations (7 C.F.R. § 46.2(x)). (Complaint, para. 3; Answer, para. 3; Tr. 26-27)[1]

3. During the period February 1985 through April 1985, respondent purchased, received and accepted 71 lots of perishable agricultural commodities, from 20 sellers in interstate and foreign commerce, but failed to make full payment promptly of the agreed purchase prices, or balance thereof, in the total amount of $395,678.18. The details of these transactions are more fully set forth in paragraph 5 of the complaint. (Complaint, para. 5; Tr. 16-26; CX-1)

4. On April 25, 1985, respondent filed a Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*), with the United States Bankruptcy Court for the Southern District of Indiana, docketed as Case No. 1P85-1720. As part of its filing in bankruptcy, it set forth and acknowledged as its own indebtedness to numerous produce sellers those debts incurred by Al McQueen and Sons. (Complaint, para. 7; Answer, para. 7; Tr. 20-23; CX-2)

5. The acts of respondent in failing to make full payment promptly of the agreed purchase prices for the 71 lots of perishable agricultural commodities it purchased, received and accepted, as more specifically alleged in paragraph 5 of the complaint, constitute wilful, flagrant and/or repeated violations of section 2 of the PACA (7 U.S.C. § 499b). Such actions also constitute a failure to maintain the trust, as required by section 5(c) of the PACA (7 U.S.C. § 499e(c)), in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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[1] Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent, respectively. References to the hearing transcript are designated "Tr.".

Discussion and Conclusions

This is a disciplinary proceeding brought pursuant to section 8 of the PACA (7 U.S.C. § 499h). The issues presented in this matter are: whether respondent is subject to license under the PACA; whether respondent failed to promptly and fully pay shippers of perishable agricultural commodities; whether such failure to make full payment promptly constitutes a failure to maintain the PACA trust assets of the 20 sellers involved; and whether respondent's failure to pay was wilful, flagrant and repeated. I find that the evidence of record supports an affirmative answer to each of these four issues.

Testimonial and documentary evidence of record introduced by complainant shows that respondent failed to make full and prompt payment with respect to 71 lots of perishable agricultural commodities it purchased in commerce from 20 sellers. Further, it was shown that the majority of the purchases of produce totalled "... one ton (2,000 lbs.) or more in weight in any day shipped, received or contracted to be shipped or received." (CX-1; Tr. 26-27) (7 C.F.R. § 46.2(x)) The transactions which did not reflect interstate shipment on the documents were later verified as being in interstate commerce. (CX-1, Transactions 3, 6; Tr. 24-26) Further evidence of record shows that respondent filed in bankruptcy on April 25, 1985, with the United States Bankruptcy Court, Southern District of Indiana. Schedules filed as part of the bankruptcy petition list all of the 20 sellers set forth in paragraph 5 of the complaint with an admitted indebtedness of $377,752.93. Although many of the invoices set forth in CX-1 are addressed to Al McQueen and Sons (61), they were acknowledged as obligations of respondent in its schedule filed with the bankruptcy petition. (CX-2) It has also been shown that a copy of the bankruptcy petition was obtained from official records of the Bankruptcy Court.

The invoices set forth in the record were provided to a Compliance Officer, USDA, by the two principal officers of respondent. They were produced in response to a request for all respondent's accounts payable. As noted, the Compliance Officer was provided with accounts payable invoices for both respondent, as well as Al McQueen and Sons, again acknowledging the debts of Al McQueen and Sons as the debts of respondent. Further, 14 of the 20 sellers listed on the schedules filed with the bankruptcy petition as debts of respondent are shown to be owed the exact sums alleged in paragraph 5 of the complaint.[2] Nor is respondent's argument that charges for pallets,

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[2] Beasley Produce, $1,080.00; Capella Farms, $3,456.00; Gator Produce Sales, Inc., $14,914.45; Robil International, $33,552.55; GAC Produce Co., Inc., $7,853.40, Mission Fruit & Vegetable Dist., Inc., $41,179 10; Avia Produce Dist., Inc., $7,588.50; Northcross Distributing, $14,158.50; Sigma Produce Co., Inc., $3,241.20; Ritelo Produce, Inc., $10,731.60; Culiacan Produce Co., Inc., $4,810.80; Frank's Distributing, Inc., $16,575.30; Venezia Bros., $1,000.00; Mike Pirrone Produce, $180; totalling $160,321.40. (CX-2)

icing, and temperature control equipment should be deducted from the charges listed for the shipments a valid one. The basis for the argument is they are not charges for perishable agricultural commodities. It has long been held that when transportation charges are "implicit in a transaction within the purview of the [PACA]," the payment of such charges becomes an "undertaking in connection with ... such transaction" as stated in section 2(4) of the PACA (7 U.S.C. § 499b(4)). *Alexis Relias v. Frank Kenworthy Company*, 16 A.D. 590, 600 (1957); *See also, Maine Banana Corporation v. Walter D. Davis, Inc.* 32 A.D. 983 (1973).

Respondent argues that such documentary evidence is hearsay and should not be considered. However, the accounts payable originated from the official files of respondent and, whether they were invoices of Al McQueen and Sons or those of respondent, they were presented to the Compliance Officer by officials of respondent as debts owed by respondent. Thus, they were relevant, probative and material, and corroborated by the schedules obtained from the official records of the bankruptcy court. Administrative agencies are not bound by the strict rules of evidence and procedures applicable in court proceedings. The rules of procedure adopted by the U.S. Department of Agriculture in adjudicatory hearings are designed to admit all relevant, probative and material evidence upon which responsible persons are accustomed to rely, unless it is unduly repetitious. *In re Corona Livestock Auction*, 36 A.D. 1285, 1311 (1977), *rev'd on other grounds sub nom. Corona Livestock v. U.S. Department of Agriculture*, 607 F.2d 811 (9th Cir. 1979); *In re DeJong Packing Co.*, 36 A.D. 1181, 1222-23 (1977), *aff'd sub nom. DeJong Packing Co. v. U.S. Department of Agriculture*, 618 F.2d 1329 (9th Cir. 1980). Therefore, it can only be concluded that respondent acted as a "dealer" engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate commerce and as such respondent was required to be licensed pursuant to 7 U.S.C. § 499a(6). It is admitted by respondent that it was not, and never had been, licensed under the PACA. (Complaint, para. 3; Answer, para. 3)

As noted above, respondent failed to make full and prompt payment of agreed purchase prices with respect to 71 lots of perishable agricultural commodities it purchased from 20 sellers in the amount of $395,687.18. The PACA makes it unlawful for any commission merchant, dealer, or broker to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities (7 U.S.C. § 499b(4)). Regulations promulgated by the Secretary, pursuant to the PACA define "full payment promptly" as requiring payment of the agreed purchase price for produce within 10 days after the day on which the produce is accepted (7 C.F.R. § 46.2(aa)(5)). Compliance with this section is ascertained by determining whether payment was made within the 10-day period. *In re Carpenito Bros., Inc.* 46 A.D. ___, [slip op. at 27 (Mar. 26, 1987), *aff'd*, No. 87-1190 (D.C. Cir. Apr. 19, 1988) (unpublished)]. Any extension of this

period of time must be reduced to writing prior to the time of the transacti (7 C.F.R. § 46.2(aa)(11)). There is no evidence in this record to show t existence of even verbal agreements, let alone written agreements, extendi the periods of payment. Therefore, respondent has violated section 2(4) the PACA (7 U.S.C. § 499b(4)).

It is a requirement of the PACA that produce dealers maintain trust asse for the benefit of produce sellers on produce sold subject to the PACA, proceeds from the resale of such produce (7 U.S.C. § 499e(c)). Failure make full payment promptly for purchases of perishable agricultur commodities in interstate or foreign commerce also constitutes a failure maintain the PACA trust assets of the 20 sellers involved and are violatio of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Nor is respondent argument that some of the unpaid sellers will eventually receive substanti payment through the bankruptcy court a defense to the alleged violation Only if full payment is made before the hearing, along with prese compliance with the PACA, will payment be considered a mitigatir circumstance. *In re Gilardi Truck and Transportation, Inc.*, 43 A.D. [11 (1984)]. As the record shows, alleged payment to some or all of the 20 selle will come about long after the hearing. Such late payments, even if mad cannot be considered as mitigating respondent's violations of the PACA. Nc can an offer of proof that payment was made to 2 or 3 sellers warrant an different consideration.

The PACA was enacted to regulate and control the handling of perishabl agricultural commodities (71 Cong. Rec. 52163 (1929)). Its passage wa occasioned by severe losses that shippers and growers were suffering due t unfair practice on the part of commission merchants, dealers, and brokers - H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *Chidsey v. Guerin*, 443 F.2d 584 (6th Cir. 1971); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976).

Respondent's failure to make full payment promptly and maintain its trust assets are clearly in violation of the prohibitions of section 2 of the PACA (7 U.S.C. § 499b). *In re Atlantic Produce*, 35 A.D. 1631 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. den.*, 439 U.S. 819 (1978). The numerous violations committed by respondent constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-74 (5th Cir. 1980) [, *cert. denied*, 450 U.S. 997 (1981)]; *In re G. Steinberg & Son, Inc.*, 32 A.D. 236 (1973), *aff'd sub. nom. George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. den.*, 419 U.S. 830 (1974). Finally, these violations were wilful. A violation is wilful if, irrespective of evil motive or erroneous advice, a person does an act prohibited by a statute or if a person carelessly disregards the requirement of a statute. *In re Henry S. Shatkin*, 34 A.D. 296

(1975); *American Fruit Purveyors v. United States, supra.* Respondent or should have known that it could not make full payment promptly large amount of perishable agricultural commodities it ordered, continued to make purchases. Respondent was aware of the requirements yet it continued to buy knowing that each purchase would in another violation. Under these circumstances, respondent was operating in careless disregard of the payment requirements of the and respondent's violations were, therefore, wilful. *Atlantic Produce, su* A.D. at 1631, 1661; *In re Rudolph John Kafcsak*, 39 A.D. 683 (1980) *mem.*, 673 F.2d 1329 (6th Cir. 1981).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Each argument raised by respondent on appeal has already thoroughly analyzed and correctly decided in the ALJ's initial de However, some additional conclusions and analysis might prove helpfu reviewing court.

Respondent erroneously argues that complainant's burden of pr properly one that respondent calls a "clear and definite stan (Respondent's Appeal of May 7, 1987, ¶ 2). (In Respondent's Proposed Findings of Fact and Law (March 17, 1987), under the he "Conclusion" on an unnumbered page at the end of the submi respondent refers to complainant's burden as one of "clear and convin proof.) Moreover, respondent argues that complainant's evidence i substantive and probative enough to meet that burden (Respondent's Ap ¶ 3).

On the contrary, the proof herein far surpasses the *preponderance* o evidence, which is all that is required.[3] Moreover, findings of fact by are consistently given great weight by the Judicial Officer (see, *In re Sp Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 176-77 (Mar 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)). Where, as here, the A Findings of Fact are adopted by the Judicial Officer, they become alr unassailable on later review. (See, *In re Victor L. Kent & Sons, Inc.*, 47 A Dec. ____, slip op. at 17-20 (Apr. 29, 1988)).

It is noteworthy that, although respondent assails complainant's pr respondent chose to put on no witnesses, and produced no nonrepetitive otherwise admissible, documentary evidence at the hearing. Thus, t arguments are found entirely without merit. See *In re Murfreesboro Lives Market, Inc.*, 46 Agric. Dec. ____, slip op. at 30-32 (Aug. 13, 1987).

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[3] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

Respondent chose on appeal to make the usual arguments in failure-to-pay cases involving bankruptcy proceedings; which arguments are routinely rejected by the Judicial Officer. In this regard, this case is identical, in all material respects, to *In re B.G. Sales Co.*, 44 Agric Dec. 2021 (1985), a copy of which is attached as Appendix B to this decision. In *B.G. Sales*, the following cases should be added to note 3, p. 5:

In re Roman Crest Fruit, Inc., 46 Agric. Dec. ___, slip op. at 5 (Apr. 7, 1987); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. ___, slip op. at 3 n. 2 (Feb. 17, 1987).

Also, to note 4, p. 5, add:

In re Walter Gailey & Sons, Inc., 45 Agric. Dec. [729, 732 (1986)]; *In re Top Quality Fruit & Produce Distributors, Inc.*, 45 Agric. Dec. [326, 327 (1986)]; *In re B.G. Sales Co.*, 44 Agric. Dec. [2021, 2024 (1985)]; *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. [2016, 2018 (1985)].

Also, to note 5, p. 5, add:

In re Anthony Tammaro, Inc., 46 Agric. Dec. ___ (Feb. 17, 1987).

Also, to note 12, p. 10, add:

In re Roman Crest Fruit, Inc., 46 Agric. Dec. ___, slip op. at 18-19 (Apr. 7, 1987).

Also, to note 13, p. 11, add:

In re Roman Crest Fruit, Inc., 46 Agric. Dec. ___, slip op. at 18-19 (Apr. 7, 1987).

Also, to note 14, p. 12, add:

In re Anthony Tammaro, Inc., 46 Agric. Dec. ___, slip op. at 6-7 (Feb. 17, 1987) (nonpayment because of bankruptcy resulting after respondent suddenly lost its largest customer); *In re B.G. Sales Co.*, 44 Agric. Dec. [2021, 2028 (1985)] (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Magic City Produce Co.*, 44 Agric. Dec. [1241, 1246 n. 3 (1985)], *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (nonpayment because respondent suffered about $200,000 in losses in 2-year period from theft of produce from his warehouse).

And, finally, to note 16, p. 15, add:

In re Carpenito Bros., Inc., 46 Agric. Dec. ____, slip op. at 4-6 (Mar. 26, 1987) (delayed payments under color of implied agreements with suppliers), *aff'd*, No. 87-1190 (D.C. Cir. Apr. 19, 1988) (unpublished).

For the foregoing reasons, the following order should be issued.

Order

A finding is hereby made that respondent committed wilful, flagrant and repeated violations of the Perishable Agricultural Commodities Act (7 U.S.C. 499b).

The facts and circumstances as set forth herein shall be published.

This order shall take effect on the 30th day after this Decision becomes final.

Appendix [A]

Applicable Statutes

1. Sec. 1(6) - (7 U.S.C. § 499a(6))

The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce . . . .

2. Sec. 2(4) - (7 U.S.C. § 499b)

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce-

* * * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain a trust as required under section 5(c);

Sec. 5(c)(2) - (7 U.S.C. § 499e(c))

Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

4. Sec. 8(a) - (7 U.S.C. § 499h)

(a) Whenever (a) the Secretary determines as provided in section 6 that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Applicable Regulations

7 C.F.R. § 46.2(x).

"Wholesale or jobbing quantities," as used in paragraph (6) of the first section of the Act, means aggregate quantities of all types of produce totalling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received.

7 C.F.R. § 46.2(aa).

'Full payment promptly' is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. 'Full payment promptly,' for the purpose of determining violations of the [PACA], means:

* * * * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted.

7 C.F.R. § 46.46(e).

Trust maintenance. (1) Commission merchants, dealers and brokers are required to maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities. Any act or omission which is inconsistent with his responsibility, including dissipation of trust assets, is unlawful and in violation of section 2 of the Act.

Appendix B

In re B.G. Sales Co., Inc., 44 Agric. Dec. 2021 (1985).

In re: MOORE MARKETING INTERNATIONAL, INC.
PACA Docket No. 2-7088.
Order filed September 8, 1988.

Appeal dismissed, stay denied - Consent Decisions final upon issuance - ALJ cannot rule on matter certified to JO - Failure to pay.

The Judicial Officer dismissed the appeal and denied a motion for a stay. Chief Judge Palmer filed a consent Decision and Order on August 1, 1987, suspending respondent's license for 30 days, and providing that if respondent does not pay all known produce creditors by November 1, 1988, its license shall be revoked. The order further provides that respondent shall file a $100,000 bond with the Secretary by September 1, 1988, which shall remain in effect for 4 years, and that any failure to maintain the bond as required shall result in the automatic suspension of its license, which suspension shall continue until an appropriate bond is posted. Respondent appealed the consent order because it was unable to obtain the bond, but a consent decision becomes "final" upon issuance, and there is no right of appeal. This is analogous to the situation where appeals are not permitted on or after the 35th day after service of a decision because it has become final. A respondent acts at his peril if he relies on erroneous advice from a government official. Settlement agreements should not be lightly overturned Once a question is certified to the Judicial Officer by an ALJ, the ALJ cannot rule on the matter, and, therefore, Judge Kane erroneously denied complainant's motion for the issuance of a decision on the pleadings, revoking respondent's license, after the Judicial Officer had ruled to that effect based on Judge Weber's certification to the Judicial Officer. Failure to pay for more than a *de minimus* amount of produce results in a license revocation. Excuses for failure to pay are irrelevant in determining willfulness or the sanction since the Act calls for payment--not excuses.

Dennis Becker, for Complainant.
Stephen P. McCarron, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER DISMISSING APPEAL AND DENYING MOTION FOR STAY

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*,[1] in which Chief Administrative Law Judge Victor W. Palmer (ALJ) filed a consent Decision and Order on August 1, 1988, suspending respondent's license for 30 days, and providing that if respondent does not pay all known produce creditors by November 1, 1988, its license shall be revoked. The order further provides that respondent shall file a $100,000 bond with the Secretary by September 1, 1988, which shall remain in effect for 4 years, and that any failure to maintain the bond as required shall result in the automatic suspension of its license, which suspension shall continue until an appropriate bond is posted.

On August 31, 1988, after serving the 30-day suspension period, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] Respondent also requested a stay of the ALJ's consent order pending the outcome of the appeal. On September 6, 1988, the case was referred to the Judicial Officer for decision.

Respondent's appeal contends that the parties were mutually mistaken about the fact that respondent could obtain a $100,000 bond by September 1, 1988, and that the order should be altered to allow respondent to post the bond by November 1, 1988.

Complainant contends that respondent lacks standing to appeal the consent decision, and further argues that the consent order should be enforced for the following reasons (Complainant's Opposition to Respondent's Appeal Petition at 3-5):

> Even if this appeal were considered, complainant must prevail. Respondent has set forth only a few of the many facts discussed in the negotiations, has made vague allegations that complainant was dilatory in advising it of the date by which the bond must be posted, but has admitted it agreed to the date because it believed it could meet the

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[1] *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1987 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

deadline. It is well known that the settlement of a case always involves numerous facts and considerations, and is the result of compromise by both parties. For that reason, it is generally inappropriate for a tribunal to look behind the agreement to assess the motives of the parties. Certainly, there is no reason for the Judicial Officer to do so on this appeal. The Consent was entered with full knowledge of its terms and consequences by both parties. Furthermore, respondent knew when it entered the Consent that complainant would not have entered the Consent if the bond were not forthcoming by September 1, 1988. Respondent said what was advantageous to it at the time to secure the Consent. It is now reneging on its statement, and saying it can post a bond by November 1, 1988, without any showing that this is more than another advantageous statement.

In return for the terms agreed to by respondent, complainant agreed to a lesser sanction than the originally requested revocation of respondent's license because it did not pay produce creditors, or even the 90 day suspension which is frequently imposed when creditors are paid late. (See *In re Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118, 146-152 (1984)). The posting of a $100,000.00 bond by September 1, 1988, was integral to its willingness to do so. If respondent had not agreed to do so, complainant would not have agreed to the imposition of a lesser sanction.

Respondent is actually requesting that the terms of the Consent Order be modified solely for its benefit without regard to the fact they were agreed to after strenuous negotiations. That respondent says it could not post a bond by September 1, 1988, is not the responsibility of complainant or this tribunal.[1] The possibility it could not

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[1] Respondent claims that sureties require either actual collateral in the amount of the bond, or the pledge of otherwise unencumbered assets. Respondent neglects to mention it could further encumber assets it apparently has, and post cash collateral with the United States Treasury (7 C.F.R. § 46.5).

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do so was obviously contemplated by the parties because the remedy for its failure to do so is contained in the Order. The Order merely provides that respondent's license shall be automatically suspended until an appropriate bond is posted. Such suspension could last as little as a day or for an indefinite period.

Complainant has made many concessions to respondent in the course of the negotiations leading to a settlement. Complainant cannot concede that respondent may operate without posting a bond. Respondent is currently in bankruptcy. Respondent's financial viability is in issue. The produce industry must be protected. The bond

provides a measure of protection. It strikes us that respondent has been reckless in entering a Consent when it cannot meet a necessary term which it negotiated. Respondent has, by its own actions, clearly proved that to allow it to operate without posting a bond would be tantamount to permitting a business with dubious judgment to put other businesses in the industry in financial jeopardy by excusing it from providing the protection which is so obviously needed.

As of today, no Stay of the Order having been issued by the Judicial Officer, respondent's license is suspended. The Judicial Officer should not modify the Consent Order. It is appropriate that respondent not be permitted to do business without posting a bond. The terms of the Order make it clear the parties contemplated that respondent might not be able to do so. Therefore, it is inaccurate for respondent to state that unexpectedly a term of the Order cannot be met. The bottom line is that respondent assumed the risk it would not be able to get a $100,000.00 bond by September 1, 1988. It cannot now complain. The alternative to letting the Order stand is draconian. The proper resolution would be to vacate the entire Order. Respondent would derive no benefit from having been suspended. The disciplinary proceeding would be reinstituted, and complainant would seek revocation of respondent's license.

Under the Department's Uniform Rules of Practice Applicable to Disciplinary Proceedings, a consent decision becomes "final" upon issuance, and, therefore, there is no right of appeal. Specifically, the rules of practice provide (7 C.F.R. § 1.138) (emphasis added):

§ 1.138 Consent decision.

At any time before the Judge files the decision, the parties may agree to the entry of a consent decision. Such agreement shall be filed with the Hearing Clerk in the form of a decision signed by the parties with appropriate space for signature by the Judge, and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. The Judge shall enter such decision without further procedure, unless an error is apparent on the face of the document. *Such decision shall* have the same force and effect as a decision issued after full hearing, and shall *become final upon issuance* to become effective in accordance with the terms of the decision.

This is in marked contrast to the finality provisions as to other decisior by an ALJ, which become "final" 35 days after service, unless there is a.. appeal to the Judicial Officer. The rules provide as to non-consent decisions (7 C.F.R. § 1.142(c) (emphasis added)):

> *§ 1.142 Post-hearing procedure.*
>
> . . . .
>
> (c) **Judge's decision.** The Judge, within a reasonable time after the termination of the period allowed for the filing of proposed findings of fact, conclusions and orders, and briefs in support thereof, shall prepare, upon the basis of the record and matters officially noticed, and shall file with the Hearing Clerk, the Judge's decision, a copy of which shall be served by the Hearing Clerk upon each of the parties. *Such decision shall become final* and effective without further proceedings *35 days after the date of service* thereof upon the respondent, *unless there is an appeal to the Judicial Officer* by a party to the proceeding pursuant to § 1.145: *Provided, however*, That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

Where an appeal from an ALJ's decision is filed after it has become final (i.e., on the 35th day after service), it has routinely been held by the Judicial Officer that he has no jurisdiction to consider an appeal filed after the decision has become final.[3] The same holding is required where an ALJ's decision has become "final" because it is a consent decision. Accordingly, respondent's appeal must be dismissed.

Since I have no jurisdiction to consider respondent's appeal, I am (at this late date) denying respondent's request for a stay pending the outcome of the appeal. It should be noted, however, that I previously gave erroneous advice

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[3] *In re Hamilton*, 45 Agric. Dec. 2395, 2395 (1986) (order denying late appeal) (appeal filed on same day order became final is not timely); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131, 1131 (1986); *In re Powell*, 44 Agric. Dec. 1220, 1220-23 (1985); *In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1234, 1234-37 (1985) (order denying reconsideration); *In re Toscony Provision Co*, 43 Agric. Dec. 1106, 1107-10 (1984), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits (erroneously I believe) notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950, 1950-52 (1983) (order denying late appeal); *In re Veg-Pro Distribs.*, 42 Agric. Dec. 1173, 1174 (1983) (order denying late appeal); *In re Dick*, 42 Agric. Dec. 784, 785 (1983) (after order is final, respondent cannot obtain appeal by labeling document motion for relief from stipulation); *In re Petro*, 42 Agric. Dec. 921 (1983) (order dismissing appeal); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427, 427-28 (1983) (order dismissing appeal; appeal filed on same day order became final was not timely); *In re Brink*, 41 Agric. Dec. 2146 (1982) (order dismissing appeal), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981); *In re Animal Research Center of Mass., Inc.*, 38 Agric. Dec. 379 (1978) (order denying late appeal); *In re Cook*, 39 Agric. Dec. 116 (1978) (order dismissing appeal).

to respondent's attorney with respect to the motion for a stay. Respondent's notice of appeal and motion for stay were filed with the Hearing Clerk at 4:45 p.m. on August 31, 1988, the day before respondent was required to post a bond, or have its license suspended by the consent decision. When the appeal and motion were brought to my attention by the Hearing Clerk's office around noon on September 1, 1988, just prior to the Labor Day weekend, I telephoned respondent's attorney (without looking at the rules of practice) and (erroneously) advised him that I would not rule on his motion because the ALJ's decision had no effect inasmuch as a timely appeal had been filed. (The rules of practice permit *ex parte* discussions as to procedural matters. 7 C.F.R. § 1.15(a)).

This is the first case in which an appeal has been filed from a consent decision,[4] and the first case in which a motion for a stay has been filed together with an appeal. I did not recall when I talked to respondent's attorney on September 1, 1988, that under the rules of practice, a consent decision is final when issued.

Although a respondent acts at his peril if he relies on erroneous advice from a government official (see *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 382-86 (1947)), presumably complainant will not seek any penalties because of respondent's operation without filing the bond, up to the day of service of this order.

If respondent's appeal were proper under the rules of practice, I would deny it on the merits since it would not be in the public interest to upset the consent agreement reached by the parties. As stated in *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1826-27 (1976), *aff'd sub nom. Indiana Slaughtering Co. v. Bergland*, No. 76-3949 (E.D. Pa. Aug. 1, 1977):

> Voluntary settlement of litigation is highly favored by the courts. *D.H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (C.A. 5), certiorari denied, 404 U.S. 851; *Autera v. Robinson*, 419 F.2d 1197, 1199 (C.A.D.C.). A trial court may summarily enforce a settlement agreement entered into by litigants while the litigation is pending before it. *Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (C.A. 2); *Massachusetts Casualty Insurance Co. v. Forman*, 469 F.2d 259, 260-261 (C.A. 5); *Autera v. Robinson*, 419 F.2d 1197, 1200 (C.A.D.C.); *Cia Anon Venezolana De Navegacion v. Harris*, 374 F.2d 33,

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[4] Other cases in which I have discussed whether a party could withdraw from a settlement agreement did not involve an appeal to the Judicial Officer from a consent Decision and Order. For example, in *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1823-30 (1976), *aff'd sub nom. Indiana Slaughtering Co. v. Bergland*, No. 76-3949 (E.D. Pa. Aug. 1, 1977), the ALJ refused to enter a consent decision that had been agreed to by the parties on the record. In *In re Dick*, 42 Agric. Dec. 784, 784-85 (1983), the respondent filed a motion to be relieved from a stipulation and consent decision filed about a year previously.

34-35 (C.A. 5); *Berger v. Grace Line, Inc.*, 343 F. Supp. 755, 756 (E.D. Pa.), affirmed, 474 F.2d 1339 (C.A. 3); *Mungin v. Calmar Steamship Corp.*, 342 F. Supp. 484, 485 (D. Md.); *Theater Time Clock Co. v. Motion Picture Adv. Corp.*, 323 F. Supp. 172, 174 (E.D. La.).

Negotiations as to a settlement of litigation are binding at the point where mutual assent has been expressed orally to settle the litigation. This is true even where the agreement has not been arrived at in the presence of the court nor reduced to writing. *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 621-622 (C.A. 6); *Green v. John H. Lewis & Co.*, 436 F.2d 389, 390 (C.A. 3); *Good v. Pennsylvania Railroad Company*, 384 F.2d 989, 990 (C.A. 3); *Main Line Theatres, Inc. v. Paramount Film Distrib. Corp.*, 298 F.2d 801, 802-804 (C.A. 3), certiorari denied, 370 U.S. 939; *Theatre Time Clock Co. v. Motion Picture Adv. Corp.*, 323 F. Supp. 172, 173-175 (E.D. La.).

Settlement agreements should not be lightly overturned. *Callen v. Pennsylvania R. Co.*, 332 U.S. 625, 630; *Strange v. Gulf & South American Steamship Co., Inc.*, 495 F.2d 1235, 1236-1237 (C.A. 5); *Mungin v. Calmar Steamship Corp.*, 342 F. Supp. 484, 486-487 (D. Md.). Even where a settlement agreement was reached because of a unilateral mistake of fact, it should be overturned only if such action is indicated by very strong and extraordinary circumstances, and where it would not be inequitable to the other party to overturn the agreement. *Hester v. New Amsterdam Casualty Company*, 268 F. Supp. 623, 626-629 (D. S. Car.).

Although the procedure applicable in court proceedings is not necessarily applicable in administrative proceedings, the reasons giving rise to the foregoing principles as to consent settlements in judicial proceedings are equally applicable to administrative proceedings. Accordingly, voluntary settlements in administrative proceedings should be enforced in the absence of extraordinary circumstances.[5]

See also complainant's views opposing respondent's appeal, quoted at the outset of this decision.

Furthermore, if respondent's appeal could properly be considered, I would *sua sponte* raise the issue as to whether respondent's license should be revoked,[6] and respondent's license would be revoked under the settled policy

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[5] In *In re Roseth*, 39 Agric. Dec. 28, 29-30 (1980), the Packers and Stockyards Administration consented to the withdrawal of a consent decision, and afforded a hearing to the respondents (without bringing that procedural matter to the attention of the Judicial Officer). However, that aberration affords no basis for a binding precedent here.

[6] See *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 634-44 (1986) (Judicial Officer *sua sponte* increased 35-day suspension to 6 months on respondent's appeal), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-52 (1977) (Judicial Officer *sua sponte* increased suspension from 30 days to 60 days on respondent's appeal), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978).

of this Department. The consent Decision and Order in this case would never have been issued if the proper procedure had been followed by the ALJs in this case.

This case was originally assigned to Administrative Law Judge William J. Weber. On June 5, 1987, he certified to the Judicial Officer the question as to whether a decision should be entered on the pleadings revoking respondent's license. On June 8, 1987, the Judicial Officer ruled in the affirmative, stating (Ruling on Certified Question):

> On June 5, 1987, Administrative Law Judge William J. Weber certified to the Judicial Officer the question as to whether a decision should be entered on the pleadings revoking respondent's license. Although respondent's answer denies the failure-to-pay violations "as more fully set forth in its Further Defense" (Answer at 1), respondent's Further Defense, together with the bankruptcy documents, show that respondent does not actually deny that it failed to pay for at least a substantial portion of the produce involved in the allegations of the complaint. Respondent's defense is that its bank wrongfully refused to make available the funds that would have been used by respondent to pay its creditors. It has been held in many prior cases, as the ALJ recognizes in the question certified to the Judicial Officer, that this Department is not interested in respondent's excuses for its failures to pay. Accordingly, a hearing would serve no useful purpose, and the decision based on the pleadings and the bankruptcy documents should be entered revoking respondent's license.

The Department's practice of refusing to afford a hearing where there is no genuine dispute was recently affirmed in *Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 607-08 (D.C. Cir. 1987). But irrespective of the soundness of the Judicial Officer's Ruling on Certified Question, under the rules of practice, an ALJ cannot himself rule on a question which has been certified to the Judicial Officer. The rules provide (7 C.F.R. § 1.143(e)):

> (e) **Certification to the Judicial Officer.** The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145 shall be made by and in the discretion of the Judge. The Judge may either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

Accordingly, the ALJ had no authority to rule that the pleadings required a hearing, once the matter had been certified to the Judicial Officer. Furthermore, even aside from our rules of practice, once the Judicial Officer has decided a matter, an ALJ has no authority to reverse the Judicial Officer's decision in view of the subordinate role of the ALJs to the Judicial Officer.

See In re Esposito, 38 Agric. Dec. 613, 663-65 (1979). As stated in *Esposito* (38 Agric. Dec. at 664), quoting from *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 143 (1975), *aff'd sub nom. J. Acevedo & Sons v. United States*, 524 F.2d 977 (5th Cir. 1975):

> The Supreme Court stated in *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 494, quoting from the Attorney General's Committee on Administrative Procedure:
>
> > In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court.
>
> The subordinate relationship of the Administrative Law Judges to the agency is stated in Davis, *Administrative Law Treatise* (1958), § 10.06, as follows:
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> > The status of the examiner should and does depend upon his functions. His two main functions are to preside and to prepare the intermediate (initial or recommended) decision. Both functions are definitely subordinate. * * *
> >
> > * * *
> >
> > To exalt the examiner to a position equal to or above that of the agency and to make him altogether independent of the agency would be clearly incompatible with the examiner's necessarily subordinate functions and with the agency's continued responsibility.

Shortly after the Judicial Officer ruled on Judge Weber's certified question, ıdge Weber retired and the case was reassigned to Judge Paul Kane, who ıd recently transferred to the Department from another agency. On Jovember 2, 1987, he erroneously denied complainant's motion for the ıssuance of a decision on the pleadings, revoking respondent's license. As tated above, once the issue as to whether an order should be issued revoking espondent's license on the pleadings was certified to the Judicial Officer, the ALJ (including the new ALJ to whom the case was reassigned) had no uthority to review and reverse the Judicial Officer's ruling.

To turn briefly to the validity of my original Ruling on Certified Question, he complaint in ¶ 6 alleges:

> 6. During the period June 1984 through April 1985, Respondent violated Section 2(4) of the PACA (7 U.S.C. 499b(4)), by failing to make full payment promptly to 53 sellers of the agreed purchase prices, or balances thereof, in the total amount of $572,779.49 for 217 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce. The details of these transactions are set forth below.

Paragraph 6 of the complaint then itemizes the 217 transactions, showing as to each, the seller and origin, quantity and commodity, date accepted, date payment due, and agreed purchase price. At the conclusion of the itemization of the 217 transactions, ¶ 6 alleges "Total amount past due and unpaid to 53 sellers is $572,779.49." Paragraph 7 of the complaint alleges:

> 7. The acts of Respondent in failing to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities it purchased, as alleged in paragraph 6 of this Complaint constitute willful, flagrant and repeated violations of the PACA.

Respondent's answer as to ¶¶ 6 and 7 of the complaint states:

> 6. Denies allegations contained in Paragraph 6 of the Complaint, as more fully set forth in its Further Defense.
>
> 7. Denies allegations contained in Paragraph 7 of the Complaint, as more fully set forth in its Further Defense.

Respondent's Further Defense, referred to in its answer, sets forth only two defenses, the main defense being that respondent was unable to pay for its produce because the bank which was financing respondent (WELLS FARGO) wrongfully seized respondent's assets and failed to provide financing, as agreed. Respondent's Further Defense concedes that the produce creditors were not paid, as follows (Answer at 4-5):

> 9. That while a fiduciary relationship existed between WELLS FARGO and Respondent, such relationship was breached by WELLS FARGO, and the sums of money which would have been available to pay the produce creditors were seized by WELLS FARGO through ostensibly legal means.
>
> 10. That the "trust provisions" of the P.A.C.A., 7 USC 499e(c)(1), were violated by WELLS FARGO in its dealings with Respondent, and the creditors of Respondent will be paid in full upon proper suit being filed and prosecuted by the appropriate parties under 7 USC 499e(c)(4). That except for such actions as stated above by WELLS FARGO, the creditors would have been paid in accordance with the rules and regulations of the Secretary made and provided.

Respondent's Further Defense makes no issue as to the interstate and foreign commerce nature of the transactions. Respondent is a California corporation doing business in California. The origin of three of the sellers is alleged to be in Arizona (¶ 6, Transactions No. 116-17, 126-29, and 164). These three transactions amount to over $40,000. In addition, the destinatio of the other shipments from California sellers is alleged to be various state

other than California, as well as Canada. Respondent raises no issue in its answer that could possibly be construed as contesting the interstate and foreign commerce nature of the transactions.

The second defense raised in respondent's Further Defense is stated as follows (Answer at 4):

> 8. That the various amounts stated as being due in Paragraph 6 of the Complaint vary from the records of the Respondent and will be subject to proof at the oral hearing.

Neither of the points raised in respondent's Further Defense presents an issue that requires a hearing. First, respondent's contention that the various amounts stated as being due in ¶ 6 of the complaint vary from the records of the respondent does not raise an issue requiring a hearing. It is well-settled under the Department's sanction policy that the license of a produce dealer who fails to pay for more than a *de minimis* amount of produce is revoked, absent a legitimate dispute between the parties as to the amount due. As stated in *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590 (1985):

> As stated above, in view of respondent's bankruptcy admissions and Complainant's Exhibits 1 and 2, it is clear that there is no material issue of fact that warrants holding a hearing. It is not necessary to show that the undisputed facts prove all the allegations in the complaint. The same order would be issued in this case unless the proven violations were *de minimis*.[3]

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[3] The violations not specifically challenged in the present proceeding amount to over $70,000.

Similarly, in the Order Denying Petition to Reconsider in *Veg-Mix*, it is stated (44 Agric. Dec. 2060, 2060 (1985)):

> Although the complaint alleges that respondent failed to pay promptly six sellers over $70,000 for 50 lots of perishable fruits and vegetables, the "same order would be issued in this case unless the proven violations were *de minimis*" (Decision and Order at 15-16). Respondent raises no arguments that would have any possibility of reducing the violations to a *de minimis* status and, therefore, detailed discussion of respondent's contentions is not necessary.

The *Veg-Mix* decision was affirmed, in this respect, by the court of appeals. *Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 607-08 (1987).

Similarly, it is well-settled that excuses for respondent's failure to pay are irrelevant in determining willfulness or the sanction since the Act calls for payment--not excuses. See *In re McQueen Brothers Produce Co., Inc.*, 47 Agric. Dec. ____ (Sept. 8, 1988), decided this day (attached as an Appendix to this decision).[7]

One final matter should be mentioned. In *In re Produce Brokers, Inc.*, 41 Agric. Dec. 2247, 2250-51 (ruling on certified question), *final decision*, 42 Agric. Dec. 124 (1982), it is stated:

> Although mitigating circumstances are generally considered in determining sanctions in the Department's disciplinary cases, all excuses as to why payment was not made have been disregarded in determining the sanction in cases involving failure to pay under the Perishable Agricultural Commodities Act in view of the statutory provisions and the nature and history of the program. *In re Esposito*, 38 Agric. Dec. 613, 632-40 (1979). . . .
>
> Judge Weber's final question -- "What might constitute mitigation to reduce the sanction?" -- involves a hypothetical question that need not be determined here. It is sufficient for present purposes to rely on settled precedent holding that the customary excuses for payment violations are ignored in determining sanctions under the Perishable Agricultural Commodities Act. Such excuses include violations caused by financial difficulties resulting from a variety of reasons, such as the failure of a large creditor to pay respondent, business recessions, strikes, adverse weather conditions, sudden loss of a major account, ill health of a key person, etc.
>
> It will be time enough to determine what extraordinary circumstance, such as war, 1932 type depression, collapse of the national banking system, etc., might constitute mitigation to reduce or eliminate a sanction under the Perishable Agricultural Commodities Act if such a circumstance is presented on the record of a case.

The record in this case raises no issue requiring a hearing to determine whether extraordinary circumstances such as those referred to in *Produce Brokers* exist. It is well-settled that excuses such as the one offered by respondent, i.e., that its bank wrongfully seized its assets and refused to extend credit, are ignored.

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[7] The *McQueen* case attaches as an Appendix the decision in *In re B.G. Sales Co., Inc.*, 44 Agric. Dec. 2021 (1985).

Respondent's license should have been revoked more than a year ago, in order to protect the public interest. In addition, I do not believe that respondent has any reasonable chance of prevailing, in the event an appeal is filed in this case. Accordingly, if respondent appeals, I will not issue an administrative stay order, pending the outcome of judicial review proceedings.

For the foregoing reasons, the following order should be issued.

Order

Respondent's appeal petition is denied. Respondent's motion for a stay is denied.

Appendix

In re McQueen Brothers Produce Co., 47 Agric. Dec. ____ (Sept. 8, 1988), which includes as an Appendix *In re B.G. Sales Co., Inc.*, 44 Agric. Dec. 2021 (1985).

In re: UNITED FRUIT and PRODUCE, INC.
PACA Docket No. D 88-525.
Decision and Order filed August 5, 1988.

Failure to make full payment promptly.

Edward M. Silverstein, for Complainant.
Respondent, pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on April 21, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service United States Department of Agriculture. It is alleged in the complaint that during the period August 1985 through October 1986, respondent purchased, received, and accepted, in interstate and foreign commerce, from 54 sellers, 341 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $442,473.19.

A copy of the complaint was served upon respondent which complainant has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, United Fruit and Produce, Inc., is a corporation, whose address is 101 Reserve Avenue, Hartford, Connecticut 06114.

2. Pursuant to the licensing provisions of the Act, license number 850988 was issued to respondent on April 15, 1985. This license was renewed annually, but terminated on April 15, 1987, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period August 1985 through October 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from 54 sellers, 341 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $442,473.19.

Conclusions

Respondent's failure to make full payment promptly with respect to the 341 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final September 28, 1988.--Editor.]

In re: VEG-MIX, INC.
PACA Docket No. 2-6612.
Remand Order filed September 22, 1988.

New evidence offered after Judicial Officer decision cannot be considered on remand.

The Judicial Officer remanded the proceeding to Chief Judge Palmer for a determination as to whether the violations occurring during Mr. Harris' association with respondent are "flagrant or repeated," in view of the remand from the court of appeals as to this issue. Newly discovered evidence, offered for the first time after the Judicial Officer's decision was issued, cannot be considered on remand. This is analogous to the situation where the Department routinely denies requests for a hearing, after respondents have failed to file timely answers explaining or denying the allegations of the complaint.

Edward M. Silverstein, for Complainant.
John M. Himmelberg, for Respondent.
Remand Order issued by Donald A. Campbell, Judicial Officer.

REMAND ORDER

The Decision and Order previously filed in this case, *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), *reconsideration and rehearing denied*, 44 Agric. Dec. 2060 (1985), was affirmed on judicial review. *Veg-Mix, Inc. v. USDA*, 832 F.2d 601 (D.C. Cir. 1987). However, in view of the court's disposition of a related proceeding involving a responsibly connected individual, Mr. Harris, who resigned from respondent before most of the violations occurred, the court remanded the proceeding to the Department to determine whether the violations occurring during Mr. Harris' association with Veg-Mix are "flagrant or repeated." As stated in the Order Denying Petition to Reconsider and to Reopen Hearing (44 Agric. Dec. at 2060):

> Although the complaint alleges that respondent failed to pay promptly six sellers over $70,000 for 50 lots of perishable fruits and vegetables, the "same order would be issued in this case unless the proven violations were *de minimis*" (Decision and Order at 15-16). Respondent raises no arguments that would have any possibility of reducing the violations to *de minimis* status and, therefore, detailed discussion of respondent's contentions is not necessary.

It has been held in many prior cases that failure to pay for produce is flagrant if it involves more than a *de minimis* amount, assuming that there is no legitimate reason for failure to make payment.

Respondent seeks to reopen the hearing for the purpose of admitting newly discovered evidence. If any newly discovered evidence were to be admitted, it would not be appropriate to permit respondent to file affidavits. Rather, complainant would be entitled to cross-examine the witness or witnesses involving the newly discovered evidence.

However, I believe that it would be inappropriate to consider newly discovered evidence under our regulations, and, also, as a matter of sound administrative practice. With respect to the newly discovered evidence, the court states (832 F.2d at 609):

> As we understand the relevant regulations, the agency is not barred from considering the untimely evidence drawing the status of the Syracuse and Jenkins transactions in question, and it may well wish to do so. [Footnote omitted.]

Since the court upheld the Judicial Officer's refusal to consider newly discovered evidence offered by respondent in a petition to reconsider the Judicial Officer's decision (832 F.2d at 609), and the Judicial Officer had not issued any further ruling in this respect that was before the court for consideration, the court's statement quoted above would seem to be dicta, not binding on the agency. Accordingly, it seems appropriate for me to express my disagreement with the court's dicta.

As I understand our rules of practice (which I helped draft), the Judicial Officer has no power to consider newly discovered evidence offered after the issuance of the decision of the Judicial Officer. The uniform rules of practice applicable to all disciplinary proceedings provide (7 C.F.R. §§ 1.132(h), .145(i), .146(a)(2)-(3) (emphasis added)):

> **§ 1.132 Definitions.**
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> . . . .
>
> (h) "Decision" means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and
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> (2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.
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> . . . .
>
> **§ 1.145 Appeal to Judicial Officer.**
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> . . . .

(i) **Decision of the Judicial Officer on Appeal.** As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

. . . .

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

. . . .

(2) **Petition to reopen hearing.** A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of *the decision of the Judicial Officer.* Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

(3) **Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.** A petition to rehear or reargue the proceeding or to reconsider *the decision of the Judicial Officer* shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

Under the rules, it is quite clear that the document I filed on August 21, 1985, headed "Decision and Order," was "the decision of the Judicial Officer," within the meaning of 7 C.F.R. § 1.146(a)(2), relating to petitions to reopen hearing. Note that the same language, "the decision of the Judicial Officer," is used in 7 C.F.R. § 1.146(a)(2) (Petition to reopen hearing) and in 7 C.F.R. § 1.146(a)(3) (Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer). Respondent could properly file a petition to rehear or reargue the "Decision and Order" filed August 21, 1985, but respondent was not permitted by the rules to ask for a reopening of the hearing after "the decision of the Judicial Officer" was filed on August 21, 1985.

On August 30, 1985, respondent filed a document headed "Petition to Reconsider the Decision of the Judicial Officer." Included within this petition was a request to reopen the hearing for the purpose of considering newly discovered evidence. I denied respondent's petition on September 25, 1985, stating (44 Agric. Dec. at 2061):

> Respondent petitions to reopen the proceeding, alleging that it is in the possession of "newly discovered evidence." But, under our Department's rules of practice, a petition to reopen a hearing must be filed "prior to the issuance of the decision of the Judicial Officer" (7 C.F.R. § 1.146(a)(2)). Accordingly, the petition is denied because it was not timely filed. But even if it could be considered under our rules of practice, the petition would be denied for the reasons set forth in Complainant's Response to Respondent's "Petition to Reconsider the Decision of the Judicial Officer." For the foregoing reasons, the petition to reconsider and to reopen is denied.

The rules of practice are very plain with respect to affording a respondent the right to file a petition to rehear after "the decision of the Judicial Officer" has been filed, but to deny a party the right to file a petition to reopen a hearing after the issuance of "the decision of the Judicial Officer."

Although the rules are plain, and need no interpretation, I participated in drafting the uniform rules of practice, and I am well aware of the fact that the rules were intentionally drafted in a manner to absolutely preclude the reopening of hearings for the purpose of considering newly discovered evidence after the decision of the Judicial Officer is issued in a case.

A rigid policy of absolutely forbidding the reopening of any hearing after the decision of the Judicial Officer has been issued is vital for this Department to cope with the ever-increasing workload.

An analogous situation is where respondents fail to file timely answers explaining or denying the allegations of the complaint, and later seek the

opportunity for a hearing. The Department routinely denies such requests,[1] *In re Robertson*, 47 Agric. Dec. ____, slip op. at 8 (May 27, 1988):

> The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and

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[1] *See In re Robertson*, 47 Agric. Dec. ____ (May 27, 1988) (default order proper where answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. ____ (Feb. 22, 1988) (default order proper where answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. ____ (Feb. 22, 1988) (default order proper where answer not filed); *In re Charton*, 46 Agric. Dec ____ (July 13, 1987) (default order proper where answer not filed); *In re Bejarano*, 46 Agric. Dec. ____ (June 22, 1987) (default order proper where timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Zedric*, 46 Agric. Dec. ____ (June 10, 1987) (default order proper where timely answer not filed); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. ____ (Apr. 6, 1987) (default order proper where timely answer not filed); *In re Carter*, 46 Agric. Dec. ____ (Mar. 3, 1987) (default order proper where timely answer not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely answer not filed); *In re Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where answer not filed), *rev'd on other grounds*, No. 87-3066 (6th Cir. Dec. 18, 1987); *In re Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where answer not filed); *In re Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where answer admits or does not deny material allegations); *In re Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where answer, filed late, does not deny material allegations); *In re Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where answer does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely answer not filed), *In re Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where answer, filed late, does not deny material allegations); *In re Guzman*, 45 Agric. Dec. 956 (1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. 556 (1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely answer not filed; respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely answer); *In re Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[5] If respondent were permitted to contest some of the

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[5] *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

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allegations of fact at this late date, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

Even if the court's observation that "the agency is not barred fron considering the untimely evidence" (832 F.2d at 609) were not regarded as dicta, the court's language is permissive--not mandatory, i.e., the court states that the agency "may well wish to" consider the untimely evidence. For the reasons stated above, the agency does not wish to consider the untimely evidence.

In addition, there is no more reason for considering the untimely evidence in this case than in any other case. The mere fact that respondent has sought judicial review, while other respondents may not have done so, is not a sufficient reason for affording this respondent the opportunity to introduce "untimely evidence," while denying that opportunity to other respondents.

Similarly, the fact that a particular "responsibly connected" individual is only interested in some of the violations is no basis for affording the opportunity to offer "untimely evidence." If respondent had any defense to any of the allegations, respondent had ample opportunity to present all relevant evidence prior to the issuance of the decision by the Judicial Officer.

For the foregoing reasons, the issue presented by the court's remand order should be decided on the basis of the original record in this case, without considering any newly discovered evidence.

Complainant suggests that no further briefs are necessary with respect to the remand proceeding since the issues have been thoroughly briefed. This is a matter to be left to the discretion of the Administrative Law Judge.

Order

This proceeding is remanded to Chief Administrative Law Judge Victor W. Palmer for a determination of the issue raised by the remand order of the United States Court of Appeals for the District of Columbia Circuit. That determination is to be made on the basis of the evidence received prior to the issuance of the decision by the Judicial Officer on August 21, 1985.

BUD ANTLE, INC. v. CALIFORNIA PRODUCE DISTRIBUTORS, INC.
PACA Docket No. R-88-181.
Order issued September 7, 1988.

Andrew Y. Stanton, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

Complainant notified the Department by letter dated August 4, 1988, that respondent had made payment in full.

Accordingly, the complaint is hereby dismissed.

CAL-WEST PACKING CO., INC. v. SQUILLANTE & ZIMMERMAN SALES, INC.
PACA Docket No. 2-7340.
Decision and Order issued September 22, 1988.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation $12,043.90, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

COUNTRY PRODUCE, INC. v. POTATO KING CORP.
PACA Docket No. R-88-229.
Order issued September 22, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed on December 15, 1987, and a formal complaint was filed on May 13, 1988. Complainant seeks to recover $18,450.50 which amount is alleged to be the total purchase price for potatoes sold to and accepted by respondent between September 25 and October 13, 1987. Respondent filed an answer to the formal complaint on July 21, 1988, admitting that $6,485.00 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $6,485.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from November 1, 1987, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

DAVALON SALES, INC. v. EMPIRE PRODUCE TERMINAL CORPORATION.
PACA Docket No. R-88-193.
Order issued September 22, 1988.

Andrew Y. Stanton, Presiding Officer.
Complainant, pro se.
Melvin Berfond, New York, NY, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

Respondent admitted allegations of the complaint, but alleged that it had been given a $400.00 credit by complaint and had paid $29,932.65 to complainant pursuant to an agreed upon payment schedule which supplanted the original contract terms regarding payment. Complainant was sent a letter giving it ten days from receipt thereof to show cause why the complaint should not be dismissed because of the existence of the allege new contract terms regarding payment. Complainant received the letter but failed to respond. Complainant was sent another letter and given an additional 10 days from receipt thereof to respond to the order to show cause, but has failed to do so.

Therefore, it was concluded that the contract between the parties was amended to permit the payment agreement claimed by respondent.

Accordingly, the complaint is hereby dismissed.

DENNIS PRODUCE SALES, INC. v. AL GILMORE, INC.
PACA Docket No. R-88-223.
Order issued September 22, 1988.

Order issued by Donald A Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

Complainant notified the Department by letter dated August 29, 1988, that it no longer wished to pursue its complaint.

Accordingly, the complaint is hereby dismissed.

EVERKRISP VEGETABLES, INC. v. ROBERT W. CASTRO d/b/a PRIMA CITRUS & FRUIT EXCHANGE.
PACA Docket No. 2-7219.
Decision and Order issued September 8, 1988.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $9,297.75, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

GRANADA MARKETING, INC., a/t/a RICHARD A. GLASS CO. v. TOM LANGE COMPANY, INC.
PACA Docket No. 2-7363.
Decision and Order issued September 27, 1988.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant
LeRoy W. Gudgeon, Northfield, IL, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $2,641.80, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until.

The counterclaim is dismissed.

H & H PRODUCE SALES, INC. v. PAMCO AIRFRESH, INC., VISTA McALLEN, INC., AND VISTA McALLEN, NOGALES, INC.
PACA Docket No. 2-7460.
Decision and Order issued September 8, 1988.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Stephen R. Knapp, Carl K. Osborne, and Rory D. Szaak, Los Angeles, CA, for Respondents.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed against Pamco and Vista McAllen. The cross complaint in this proceeding is dismissed.

Within 30 days from the date of this Order Vista McAllen Nogales shall pay to complainant $7,725.00, with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid.

JIM HRONIS & SONS v. LUNA CO., INC. d/b/a BAKERSFIELD PRODUCE & DISTRIBUTING CO.
PACA Docket No. 2-7338.
Decision and Order issued September 13, 1988.

Purchase after inspection - Contracts - Inspection by purchaser.

Trade term "purchase after inspection" contemplates inspection of specific goods purchased, and agreement by parties when the contract is entered that there shall be no right of rejection at destination. Where respondent inspected a sample rather than the goods actually shipped, it had right to reject them at destination

George S. Whitten, Presiding Officer
Complainant, pro se
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer

DECISION AND ORDER
Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. Section § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $5,297.18 in connection with the shipment in interstate commerce of two truckloads of Thompson seedless grapes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant, and asserting a counterclaim arising out of the same transactions covered by the formal complaint in the total amount of $4,919.90. Complainant did not file a reply to the counterclaim, and pursuant to Section 47.9 (c) of the Rules of Practice (7 C.F.R. §47.9 (c)) the allegations contained in the answer and counterclaim are automatically regarded as denied.

The amount claimed in neither the formal complaint nor counterclaim exceeds $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. §47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent also filed a brief.

Findings of Fact

1. Complainant, Jim Hronis, is an individual doing business as Jim Hronis & Sons, whose address is Route 1, Box 267A, Delano, California. At the time of the transactions involved herein complainant was not licensed under the Act.

2. Respondent, Luna Co., Inc., is a corporation doing business as Bakersfield Produce & Distributing Co., whose address is P. O. Box 2346, Bakersfield, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about October 18, 1985, complainant sold to respondent 1440 lugs of Thompson Seedless grapes, Wild Greek label, at $5.00 per lug, plus $.70 per lug for precooling and palletization, and $22.50 for a Ryan temperature recorder, less brokerage in the amount of $.15 per lug, or a total for the load of $8,014.50, f.o.b.

4. The grapes were shipped from complainant's cold storage in Delano, California on October 18, 1985, to respondent's customer in Elloree, South Carolina. On October 23, 1985, at 2:55 p.m., the grapes were inspected at the place of business of Food Lion, Inc., in Elloree, South Carolina while still on the truck with the following results in relevant part:

> Temperature of Product: Rear Doors: Top 36 degrees F., bottom, 37 degrees; 3/4 length: Top, 34 degrees F.
>
> . . .

Condition: Thompson Seedless Lot: Berries are firm and mostly firmly attached to cap stems. Stems green and pliable. Most samples, shattered berries range 11 to 17% many samples range 19 to 20%, average 16%. No decay. . . .

5. On or about October 18, 1985, complainant sold to respondent 1350 lugs of Thompson Seedless grapes, Wild Greek label, at $5.00 per lug, plus $.70 per lug for precooling and palletization, and $22.50 for a Ryan temperature recorder, less brokerage of $.15 per lug, or a total of $7,515.00, f.o.b.

6. The grapes were shipped from complainant's cooler in Delano, California on October 18, 1985, to respondent's customer in Prince George, Virginia. On October 23, 1985, at 10:15 a.m., the grapes were inspected at the place of business of Food Lion, Inc., in Prince George, Virginia with the following results in relevant part:

Temperature of Product: At rear doors: 36 degrees F. Top 36 degrees F. Bottom. Various other parts of load 36 to 38 degrees F.

. . .

Condition: Berries are generally firm and mostly firmly attached to cap stems. Stems light green and pliable. From 11 to 20%, average 16% shattering. Less than 1% decay.

7. Both loads of grapes were rejected by respondent shortly after arrival at destination. Complainant was promptly notified of the rejection.

8. An informal complaint was filed on November 6, 1985, which was within nine months after the causes of action alleged herein accrued.

Conclusions

It is evident from the federal inspections of the two loads of grapes made shortly after arrival that the grapes did not make good delivery under the suitable shipping condition warranty applicable in f.o.b. sales. (See 7 C.F.R. §46.43(i) & (j)). However, complainant contends that the grapes in each load were sold on a "purchase after inspection" basis. The regulations, Section 46.43 provide in relevant part that:

The following terms and definitions, when used in any contract or communication involving any transaction coming within the scope of the Act, shall be construed as follows:

. . .

(ff) "Purchase after inspection" means a purchase of produce after inspection or opportunity for inspection by the buyer or his agent. Under this term the buyer has no right of rejection and waives all warranties as to quality or condition, except warranties expressly made by the seller.

Complainant submitted extensive documentation relative to the two loads of grapes. Included in this documentation is a telephone order form relative to each load, a shipping manifest, invoices as to each load, and copies of mailgrams sent relative to each load following rejection of the loads by respondent. In none of this documentation is any reference made to the trade term "purchase after inspection". However, complainant contends that there was an actual inspection conducted by an agent for respondent of the subject grapes. Originally this contention was made by Sophia Hronis and Jim Hronis in correspondence that is included in the Department's report of investigation. Such correspondence refers to a "Ralph" as being the agent of respondent who made the inspection of the grapes. Respondent replied with evidence that there had been no "Ralph" in its employ during the time in question and submitted an affidavit by a Sammy Helm who stated that he was field man for respondent and did go to complainant's cold storage in Delano, California to inspect several loads of grapes including grapes which were to be placed on the two trucks involved in this case. Mr. Helm stated he was not allowed to enter the cooler belonging to complainant, and only inspected pallets of grapes that were brought out on the dock by complainant for him to look at. Mr. Helm further stated that he talked to Jim Hronis and discussed with Jim Hronis the amount of shatter that he noticed in the grapes, and was assured by Jim Hronis that there was no doubt in his mind that the grapes would make it to destination. Mr. Helm stated that while he tagged grapes which were to go on several loads, he was unable to wait and tag grapes which were to go on the subject two loads, and trusted Hronis & Sons to load good grapes relative to such loads. Complainant replied with an affidavit from Pete Hronis stating that respondent's practice was always to tag every pallet of grapes that were shipped from complainant's cooler, that Sammy Helm's statement that he could not wait to tag the grapes on the two loads involved in this shipment was false, and that he was the person who dealt with Sammy Helm and not Jim Hronis. The record contains letters in November and December of 1985, from Sophia Hronis and Kosta Hronis both of which state that the field man for respondent "tagged certain pallets" relative to the grapes which were shipped during the time frame involved in this proceeding.

First of all it should be noted that "purchase after inspection" is a trade term which the Regulations contemplate being expressly used by the parties in their communication with each other when the contract is formed. Whether or not there was an express usage of the term, or of words of similar import, has been deemed highly significant in past decisions. See *Ritepak Produce v. Green Grove Markets*, 29 Agric. Dec. 165 (1970) and *Goldstein Fruit & Produce v. East Coast Distributors*, 18 Agric. Dec. 493 (1959). In this case

the evidence fails to substantiate a usage of the term or of any words of similar import during the formative stages of the contracts between the parties. In addition we have held on numerous occasions that a purchase after inspection must involve an inspection of the specific produce sold and not an inspection of the general run of produce or of a sample of the produce. See *L. T. Malone Co. v. Al Kaiser & Bros.*, 18 Agric. Dec. 1221 (1959), and *PACA Doc. No. 5123*, 9 Agric. Dec. 146 (1950). In this case, we do not believe that a preponderance of the evidence supports complainant's position that an inspection of the specific grapes loaded on the two trucks sold to respondent was made by respondent's agent. We find that there was no purchase after inspection involved in this case.

Respondent's rejection of the two truckloads of grapes was both timely and rightful. Accordingly, complainant has no cause of action against respondent. The complaint should be dismissed.

Since complainant is not licensed under the Act and there is no evidence in the record that complainant was operating subject to license we do not have jurisdiction to adjudicate respondent's counterclaim. The counterclaim should also be dismissed.

Order

The complaint is dismissed.
The counterclaim is dismissed.
Copies of this order shall be served upon the parties.

FRANK MINARDO, INC. v. INTERCOAST MARKETING, INC.
PACA Docket No. 2-7397.
Decision and Order issued September 27, 1988.

George D. Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed.

MUSCATINE ISLAND COOPERATIVE ASSOCIATION v. M.S. THIGPEN PRODUCE CO., INC.
PACA Docket No. R-88-210.
Reparation Order issued September 7, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $19,163.49, with interest thereon at the rate of 13 percent per annum from September 1, 1987, until paid.

EDWIN R. O'NEILL, J.E. O'NEILL, INC., and A. PAUL MELLO d/b/a O'NEILL FARMING ENTERPRISES v. GERALD LOWRIE d/b/a L & L PACKING CO. OF CALIF.
PACA Docket No. 2-7402.
Decision and Order issued September 22, 1988.

John J. Casey, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days of the date of this order, respondent Gerald Lowrie shall ıay to complainant Edwin R. O'Neill, J.E. O'Neill, Inc., and A. Paul Mello the um of $8,014.27 plus interest thereon at the rate of 13 percent per annum rom May 1, 1986 until paid.

:MBERTON PRODUCE, INC. v. GREEN BARN RANCHES, INC.
\CA Docket No. R-88-235.
:paration Order issued September 16, 1988.

ler issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to ımplainant, as reparation, $10,309.00, with interest thereon at the rate of 13 ırcent per annum from July 1, 1987, until paid.

JERRY PEPELIS d/b/a JERRY PEPELIS PACKING CO. v. CARUSO PRODUCE, INC.
PACA Docket No. 2-7407.
Decision and Order issued September 8, 1988.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $3,983.05, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

PHELAN & TAYLOR PRODUCE CO., INC. v. PAMCO AIRFRESH, INC., and/or VISTA McALLEN, INC.
PACA Docket No. 2-7286.
Decision and Order issued September 8, 1988.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Carl K. Osborne and Stephen R. Knapp, Los Angeles, CA, for Respondents.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed. The cross complaint in this proceeding is dismissed.

PROCACCI BROS. SALES CORPORATION v. ANTLE BROTHERS and TANIMURA BROTHERS d/b/a TANIMURA and ANTLE.
PACA Docket No. 2-7528.
Decision and Order filed September 13, 1988.

Jurisdiction - Statute of limitations.

Respondent's filing of an informal complaint does not toll the running of the nine month statute of limitations for complainant. Complainant must independently file its own complaint within nine months of the date of the transaction for the Secretary to assume jurisdiction.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A complaint was filed in which complainant seeks reparation from respondent, in the amount of $5,478.09, in connection with two transactions in interstate commerce involving various varieties of lettuce, all of which are perishable agricultural commodities.

Each party was served with a copy of the Department's report of investigation. Respondent, also, was served with a copy of the formal complaint, and filed an answer thereto in which it denied any liability to complainant with respect to the two transactions.[1]

As the amount involved did not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) was followed. Pursuant to that procedure, the verified pleadings of the parties are considered as part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant submitted an opening statement. Neither party submitted a brief.

[1] It should be noted at the onset that, although the progenitor of this case was respondent's complaint to the Department that complainant had not paid it the agreed contract prices for, *inter alia*, these loads of lettuce, the respondent failed to file a counterclaim against complainant for the agreed contract prices of the two trucklots of lettuce after complainant made its claim for the alleged deficit resulting from its handling of them.

Findings of Fact

1. Complainant, Procacci Bros. Sales Corp., is a corporation whose address is 3655 South Lawrence Street, Philadelphia, Pennsylvania 19148.

2. Respondent, Tanimura and Antle, is a partnership consisting of the Tanimura Brothers and the Antle Brothers whose mailing address is P.O. Box 4707, Salinas, California 93912. At all material times, respondent was licensed under the Act.

3. On or about June 28, 1985, the complainant purchased one trucklot of mixed lettuce from the respondent as follows: 252 cartons of Green Leaf at $4.00 f.o.b. per carton ($1,008.00), 294 cartons of Red Leaf at $3.00 f.o.b. per carton ($882.00), 387 cartons of Romaine at $3.00 f.o.b. per carton ($1,161.00), and 70 cartons of Boston at $3.00 f.o.b. per carton ($210.00), plus $1.00 per carton for cooling and palletizing ($1,003.00), 15¢ per carton for brokerage ($150.45), and $22.50 for a temperature recorder, for a total agreed f.o.b. contract price of $4,436.95. The broker on the transaction was Davidson Distributing ("Davidson"), 11800 Foxwood Lane, Salinas, California 93907. Transportation of the lettuce was handled by Transfax, a division of Fresh Intermodal Transport, Inc., P.O. Box 87, Salinas, California 93902, and cost $3,600.00. The trucklot of lettuce was shipped on June 28, 1985, and was received and accepted by the complainant on July 5, 1985, a Friday. Sometime after it was received and accepted by the complainant, the complainant transferred title to the lettuce to Garden State Farms, Inc. ("Garden State"), 3655 South Lawrence Street, Philadelphia, Pennsylvania 19148,[2] which, at 2:30 p.m. on that date, requested inspection of it. The inspection took place at 10:30 a.m. on Monday, July 8, 1985. On the certificate issued thereafter (No. C-066039), it is reflected that the inspection took place in Garden State's warehouse, that the temperature of the lettuce ranged from 38° to 39° F., and that the condition of the lettuce was as follows:

> Red lead lot: Decay from 9 to 14 plants per carton average 45%.
> Green leaf lot: Decay from 8 to 11 plants per carton average 37%.
> Romain lot: Decay from 1 to 3 plants in most cartons, none in some, average 6%.
> Boston lot: Decay from 6 to 10 heads per carton average 32%.
> Each lot: Decay is Bacterial Soft Rot in Various stages.

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[2] It is noted that, although the record does not reflect what the relationship betwe complainant and Garden State is, Garden State's address is the same as complainant's. addition, official notice is taken of the fact that the Department's records reflect that Gare State also is a licensee under the Act.

4. On some unknown date, Garden State prepared a document indicating that *it* had sold the subject trucklot of lettuce for the respondent with the following results:

			70 Boston		
26	@	2.50		65.00	
38	@	2.00		76.00	
6	@	1.00		6.00	147.00
			294 Red Leaf		
7	@	3.00		21.00	
55	@	2.00		110.00	
153	@	1.00		153.00	
79	@	.50		39.50	323.50
			252 Green Leaf		
61	@	2.00		122.00	
81	@	1.50		121.50	
110	@	1.00		110.00	353.50
			387 Romaine		
5	@	6.50		32.50	
31	@	6.00		186.00	
87	@	4.00		348.00	
163	@	3.00		489.00	
101	@	2.00		202.00	1,257.50
			Gross Proceeds		2,081.50

In addition to not indicating the date on which it was prepared, the document prepared by Garden State does not indicate when the sales of the lettuce were made, does not report any costs to it for sale of the lettuce, nor does it indicate how much, if anything, it paid to complainant with respect to the lettuce.

5. On July 8, 1985, the Philadelphia Wholesale Fruit and Vegetable Report reported the prices of the subject varieties of lettuce as follows: (a) Leaf - $12.00 - 14.00 most $13.00; (b) Romaine - $10.00, few $11.00; (c) Boston - $8.00; and (d) Red - $10.00 - 11.00, few $9.50.

6. On or about October 26, 1985, the complainant purchased a trucklot of mixed lettuce from the respondent as follows: 310 Green Leaf at $5.00 f.o.b. per carton ($1,550.00), 320 Red Leaf at $5.00 per carton ($1,600.00), and 315 Romaine at $7.00 per carton ($2,205.00), plus $1.00 per carton for cooling ($945.00) and palletizing, 15¢ per carton for brokerage ($141.75), and $22.50

for a temperature recorder, for a total agreed f.o.b. price of $6,464.25. The broker on the transaction, again, was Davidson. Transportation of the lettuce was handled by Cornucopia Transportation, Inc. ("Cornucopia"), P.O. Box 157, 45 Plaza Circle, Salinas, California 93902, and cost $2,850.00. The trucklot of lettuce was shipped on October 26, 1985, and was received and accepted by complainant on Friday, November 1, 1985. Sometime after it was received and accepted by complainant, the complainant transferred title to the ettuce to Garden State which requested that it be inspected. The inspection ook place on Monday, November 4, 1985. On the certificate issued thereafter No. C-069110), it is reflected that the temperature of the lettuce ranged from 7° to 39° F., and that the condition of the lettuce was as follows:

> Green leaf lot - Heads generally firm and crisp. Decay in most cartons from 1 to 5 heads, some none, average 8% Bacterial Soft Rot in various stages. Red leaf lot Heads mostly fresh and crisp. Decay from 9 to 14 heads per carton, average 46% Bacterial Soft Rot in various stages. Romain lot - Plants mostly firm and crisp. Decay from 3 to 8 plants per carton, average 23% Bacterial Soft Rot in various stages.

8. At 2:00 p.m., on November 19, 1985, "181 cartons Romaine, 203 cartons ed Leaf and 175 cartons Green Leaf" lettuce were inspected at Garden ate's warehouse. On the certificate issued thereafter (C-069550), the mperature of the lettuce is reflected as 45° F., and the condition of the ttuce is reflected as follows: "Each lot: All stock in all cartons examined 00%) shows serious damage by discolored leaves and/or decayed Bacterial oft Rot in advanced stages." It also was noted that Garden State stated that intended to dump the lettuce which was covered by the certificate.

9. On some unknown date, Garden State prepared a document indicating iat *it* had sold the subject trucklot of lettuce for the respondent with the ollowing results:

310 Green Leaf

175 Dumped			----	
17	@	4.50	76.50	
54	@	4.00	216.00	
40	@	3.00	120.00	
24	@	2.50	60.00	472.50

320 Red Leaf

230 Dumped			----	
24	@	6.00	144.00	
78	@	5.50	429.00	
15	@	5.00	75.00	648.00

181 Dumped				----	
5	@	4.00		20.00	
24	@	3.00		72.00	
69	@	2.50		172.50	
36	@	2.00		72.00	336.00
			Gross Proceeds		1,457.00

In addition to not indicating the date on which it was prepared, the docume prepared by Garden State does not indicate when the sales of the lettuce wei made, does not report any costs to it for sale of the lettuce, nor does indicate how much, if anything, it paid to complainant with respect to th lettuce.

10. Complainant filed a truck claim with Cornucopia (No. 1609), an received a credit of $1,800.00 against the truck bill of $2,850.00.

11. On November 4, 1985, the Philadelphia Wholesale Fruit an Vegetable Report reported the prices of the subject varieties of lettuce a follows: (a) Leaf - $8.00 to $10.00, few $11.00, fair condition - $5.00 to $6.0((b) Red - few $9.50 to $11.00; and (c) Romaine - $14.00 to $15.00, mos $14.00, $11.00 to $13.00 most $11.00 to $12.00 some $9.00 to $10.00, fai condition $8.00.

12. An informal complaint was filed against respondent on April 18, 198(by Garden State. A formal complaint was filed against respondent by th complainant on November 12, 1986.

Conclusions

As the Act requires that reparation complaints filed pursuant to it be filed within nine months after a cause of action accrues, 7 U.S.C. § 499f(a), the dispositive issue in this matter is whether we have jurisdiction to hear it. The Department received an informal complaint concerning the two subject transactions from Garden State on April 18, 1985, but did not receive any complaint concerning these transactions from the complainant until November 12, 1986, when complainant filed its formal complaint. The first cause of action herein accrued not later than July 5, 1985, and the second not later than November 4, 1985, when the complainant found out the results of the federal inspections. *See Pelletier Fruit Co. v. Koutroulares*, 19 Agric. Dec. 1232 (1960). Therefore, the latest that complainant could have filed a timely complaint as to the earlier transaction was April 4, 1986. Thus, even if we interpret the informal complaint filed by Garden State on April 18, 1986, as being filed by the complainant, it was not filed within nine months after the first cause of action stated therein accrued. However, it is clear that the April 18, 1986, document was *not* filed by complainant, but was filed by Garden State, a separate and distinct corporate entity, consequently we must conclude that the first compliant which the Department received from the complainant

concerning this matter was received on November 12, 1986. Therefore, as the complainant only had until April 5, 1986, to file a complaint as to the first transaction, and only until August 4, 1986, to file a complaint as to the second transaction, we must hold that its complaint was not timely filed, and that the complaint must be dismissed. *Freshpict Foods v. Consumers Produce*, 29 Agric. Dec. 163 (1970); *Immokalee Vegetable v. Rosenthal*, 29 Agric. Dec. 483 (1970).[3]

In any event, even had we considered the case on the merits, we would have had to have concluded that it should be dismissed. The complaint as to the second transaction would have been dismissed because it is clear that the complainant filed a truck claim against Cornucopia and that Cornucopia accepted liability for the damage to the lettuce by allowing complainant an $1,800.00 credit against its charge for transporting the lettuce. Since the trucking company accepted liability for the damage, it would have been necessary for us to conclude that there were abnormal transportation conditions present. Since such abnormal transportation conditions void a shipper's warranty of suitable shipping condition, *Berman Propper & Co. v. Luft Produce Co.*, 9 Agric. Dec. 866 (1950), it would have been concluded that the complainant failed to prove any breach on respondent's part with respect to the lot of lettuce complainant received on or about November 1, 1985.

Moreover, and as to both of the lots, it would have been necessary for us to dismiss the complaint because: (a) the complainant failed to carry its burden of proving that respondent breached its warranty of suitable shipping condition because it failed to prove that shipping conditions were normal, *i.e.*, complainant, as part of its burden of proof, had to allege and prove that there were no abnormal shipping conditions present, but the complainant, by failing to adduce the tape from the temperature recorder on each of the trucks and failing to explain why the transport time on each lot exceeded the norm,[4] failed to do so. *See Wade Hatcher et al. v. Bell Tomato Co.*, 29 Agric. Dec. 1057 (1970). It is an especially critical element in this case because, at least as to the second lot of lettuce, it is apparent that the trucker is taking responsibility for the damage; and (b) complainant failed to prove damages,

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[3] This is unlike the case where a respondent files a counterclaim involving the same transaction made the subject of a formal complaint beyond the nine month period. In those cases, we have held that we do have jurisdiction to hear the *counterclaim*. *See Veneer Co v. McCaffrey Bros. Co.*, 15 Agric. Dec. 405, 410 (1956), *Chapin Bros, Inc v Michael Bros*, 15 Agric Dec. 616, 619 (1956); *C.F. Smith, Inc. v. Bushala*, 21 Agric. Dec 1365, 1370 (1962), and *Calagno Farms v. Spring Kist Sales*, 22 Agric. Dec. 406, 410-11 (1963)

[4] The accepted norm for transportation from California to Pennsylvania is five days, but each of the subject lots of lettuce were in transit for seven days. *See Freshpict v. M.J. Navillo*, 32 Agric. Dec. 1600 (1973): A one day delay in delivery of lettuce voids the shipper's warranty of suitable shipping condition.

i.e., a necessary element for the complainant to show in order to establish the value of the goods actually received is the amount of the return on their *prompt and proper* resale. *New England Grape v. Crane*, 30 Agric. Dec. 992 (1971). However, the accounts of sale adduced by the complainant *do not show a prompt* resale since they do not reflect the date on which the lettuce was sold. This is especially true as to the second lot of lettuce because, without any explanation as to why the lettuce remained unsold, the evidence reflects that a major portion of it was still unsold on November 19, 1985, or two weeks after it was first inspected.

Furthermore, the complainant failed to provide any information by which we could form a conclusion as to its business relationship with Garden State. Without that information, we could not form a conclusion as to whether complainant suffered any damages at all since the only evidence in the record shows sales by Garden State and does not reflect whether Garden State paid complainant the gross proceeds shown in the accounting, or whether complainant paid Garden State the deficit complainant claims, or whether it was only Garden State, who is *not* a party to this proceeding, and not complainant, who suffered any damages.

In view of the above, it is clear that the complaint must and should be dismissed.

Order

The complaint is dismissed.

PRODUCE CENTER, INC. v. M. OFFUTT & CO., INC.
PACA Docket No. 2-7432.
Order of Dismissal issued September 7, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

Complainant has requested a dismissal of its complaint with prejudice. Accordingly, the complaint is hereby dismissed with prejudice.

QUAKER CITY PRODUCE CO. v. JERSEY COAST PRODUCE CO., INC.
PACA Docket No. 2-7396.
Decision and Order issued September 27, 1988.

Dennis Becker, Presiding Officer.
Malcolm H. Waldron, Jr., Philadelphia, PA, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $825.00, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

PETER A. STICCO d/b/a COAST-TO-COAST PRODUCE v. CALIFORNIA CUSTOM CUTS.
PACA Docket No. R-88-202.
Reparation Order issued September 27, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $13,976.80, with interest thereon at the rate of 13 percent per annum from November 1, 1987, until paid.

SUNFRESH DISTRIBUTING CO. v. TREASURE VALLEY FOODS, INC.
PACA Docket No. R-88-36.
Order of Dismissal issued September 22, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

The parties entered into a stipulation that the above-captioned case be dismissed with prejudice.

Therefore, the complaint is hereby dismissed with prejudice.

SUNSET STRAWBERRY GROWERS v. THE HARWOOD CO., INC.
PACA Docket No. 2-7218.
Decision and Order issued September 13, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $7,854.14 with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid.

JERRY TALLEY CO. v. RICHARD SHELTON d/b/a MID-VALLEY BROKERAGE CO.
PACA Docket No. 2-7410.
Decision and Order issued September 8, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $8,095.50 with interest thereon at the rate of 13 percent per annum from July 1, 1986, until paid.

TOMATOES, INC. v. RALPH & CONO COMUNALE PRODUCE CORPORATION.
PACA Docket No. 2-7400.
Decision and Order issued September 27, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $1,724.00, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

TOP NOTCH PRODUCE INC. v. EAST COAST BROKERS AND PACKERS INC.
PACA Docket No. 2-7379.
Decision and Order issued September 22, 1988.

Andrew Y. Stanton, Presiding Officer
Complainant, pro se.
John M Hommelberg, Washington, D.C, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $9,961.00, with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid.

Respondent's counterclaim is hereby dismissed.

TRAY-WRAP, INC. v. TOMATO MAN, INC.
PACA Docket No. 2-7412.
Decision and Order issued September 8, 1988.

Dennis Becker, Presiding Officer.
Linda Strumpf, Bronx, NY, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed.

VALLEY HARVEST DISTRIBUTING, INC. v. ALL POINTS PRODUCE CORP.
PACA Docket No. 2-7413.
Decision and Order issued September 8, 1988.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $6,262.50 with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

ROBERT D. WURDEN, a/k/a BOB WURDEN v. WINDSOR FARMS, INC., and/or MID-AMERICAN POTATO COMPANY.
PACA Docket No. 2-7158.
Dismissal filed September 7, 1988.

Andrew Y. Stanton, Presiding Officer.
Donald M. Leonard, East Grand Forks, MN, for Complainant.
Stephen P. McCarron, Silver Spring, MD, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

DISMISSAL OF PETITION FOR RECONSIDERATION
(Summarized)

Respondents' petition for reconsideration is hereby dismissed without service upon complainant.

The August 3, 1988, stay order is hereby vacated, and the July 1, 1988, decision and order is reinstated, with the amount awarded therein, including interest and fees and expenses, to be paid to complainant within 30 days from the date of this order.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

(Summarized)

ACTION PRODUCE v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-425.
Default Order issued September 14, 1988.

Respondent was ordered to pay complainant, as reparation, $2,829.35, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

ARKANSAS VEGETABLE DISTRIBUTORS INC. v. WAINER FRUIT CO. INC.
PACA Docket No. RD-88-419.
Default Order issued September 14, 1988.

Respondent was ordered to pay complainant, as reparation, $7,200.00, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

ASSOCIATED POTATO GROWERS INC. v. INDEPENDENCE PRODUCE COMPANY INC.
PACA Docket No. RD-88-399.
Default Order issued September 2, 1988.

Respondent was ordered to pay complainant, as reparation, $8,327.50, plus 13 percent interest per annum thereon from May 1, 1987, until paid.

RONALD E. BAIERS d/b/a RONALD BAIERS v. CHOCOLATE RARITIES INC. d/b/a JORGENSEN CANDY CO.
PACA Docket No. RD-88-406.blue crest
Default Order issued September 1, 1988.

Respondent was ordered to pay complainant, as reparation, $13,522.75, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

BLUE CREST BLUEBERRY GROWERS ASSOCIATION COOP. INC. v. PLYMOUTH FARMS INC.
PACA Docket No. RD-88-456.
Default Order issued September 28, 1988.

Respondent was ordered to pay complainant, as reparation, $16,313.40, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

COLORADO POTATO GROWERS EXCHANGE v. ROBERT L. DARBY and RONALD J. DARBY d/b/a DARBY'S PRODUCE.
PACA Docket No. RD-88-397.
Default Order issued September 2, 1988.

Respondent was ordered to pay complainant, as reparation, $1,312.50, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

COLORADO POTATO GROWERS EXCHANGE v. SKLARZ PRODUCE CO. INC.
PACA Docket No. RD-88-451.
Default Order issued September 29, 1988.

Respondent was ordered to pay complainant, as reparation, $37,554.75, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

COMMERCIAL INTERNATIONAL CORP. a/t/a GROWERS DISTRIBUTING INTERNATIONAL.
PACA Docket No. RD-88-409.
Default Order issued September 1, 1988.

Respondent was ordered to pay complainant, as reparation, $15,948.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

COOK DISTRIBUTING CO. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-420.
Default Order issued September 14, 1988.

Respondent was ordered to pay complainant, as reparation, $2,730.25, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

CORNUCOPIA TRADING CO. INC. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-434.
Default Order issued September 15, 1988.

Respondent was ordered to pay complainant, as reparation, $14,533.75, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

De BRUYN PRODUCE CO. v. ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-432.
Default Order issued September 15, 1988.

Respondent was ordered to pay complainant, as reparation, $8,755.25, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

De BRUYN PRODUCE CO. v. LOUIS KALECK d/b/a KALECK DISTRIBUTING COMPANY.
PACA Docket No. RD-88-435.
Default Order issued September 15, 1988.

Respondent was ordered to pay complainant, as reparation, $13,105.00, plus 13 percent interest per annum thereon from May 1, 1987, until paid.

DIXIE GROWERS INC. v. VIC MAHNS INC.
PACA Docket No. RD-88-408.
Default Order issued September 1, 1988.

Respondent was ordered to pay complainant, as reparation, $2,710.95, pl 13 percent interest per annum thereon from June 1, 1987, until paid.

FRESH & WILD, INC. v. NORTHERN PRODUCE/MUSHROOMS, INC.
PACA Docket No. RD-88-405.
Order issued September 28, 1988.

ORDER OF DISMISSAL
(Summarized)

Respondent notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim.

Accordingly, the complaint is hereby dismissed.

FRESH BEGINNINGS INC. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-453.
Default Order issued September 29, 1988.

Respondent was ordered to pay complainant, as reparation, $316.75, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

GRIFFIN & BRAND SALES AGENCY INC. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-454.
Default Order issued September 29, 1988.

Respondent was ordered to pay complainant, as reparation, $12,284.5(plus 13 percent interest per annum thereon from September 1, 1987, unt paid.

GROWERS PRODUCE v. MITSUGU TANITA AND WAYNE WOOD d/b/a MITS TANITA SALES.
PACA Docket No. RD-88-449.
Default Order issued September 29, 1988.

Respondent was ordered to pay complainant, as reparation, $13,337.60, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

JOHN B. HARDWICKE COMPANY v. TOM-ROB CORPORATION.
PACA Docket No. RD-88-437.
Default Order issued September 29, 1988.

Respondent was ordered to pay complainant, as reparation, $5,695.25, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

GLENN HARVEY & SON INC. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-431.
Default Order issued September 15, 1988.

Respondent was ordered to pay complainant, as reparation, $3,517.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

GLENN HARVEY & SON INC. v. CENTRAL PRODUCE CO. INC.
PACA Docket No. RD-88-401.
Default Order issued September 2, 1988.

Respondent was ordered to pay complainant, as reparation, $2,131.70, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

J-B DISTRIBUTING CO. v. WAYNE WOOD AND MITSUGU TANITA d/b/a MITS TANITA SALES.
PACA Docket No. RD-88-398.
Default Order issued September 2, 1988.

Respondent was ordered to pay complainant, as reparation, $19,209.50, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

CHARLES E. JONES AND STEVEN D. JONES, d/b/a JONES PRODUCE.
PACA Docket No. RD-88-336.
Default Order issued September 28, 1988.

Respondent was ordered to pay complainant, as reparation, $11,874.50, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

KLAMATH POTATO DISTRIBUTORS INC. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-430.
Default Order issued September 15, 1988.

Respondent was ordered to pay complainant, as reparation, $14,501.72, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

TOM LANGE COMPANY INC. v. NEW YORK PRODUCE AMERICAN & KOREAN AUCTION CORP. a/t/a A & K PRODUCE.
PACA Docket No. RD-88-396.
Default Order issued September 2, 1988.

Respondent was ordered to pay complainant, as reparation, $165,179.89, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

SAM J. MAGLIO JR. d/b/a MAGLIO & COMPANY v. GREAT LAKES DISTRIBUTORS, INC.
PACA Docket No. RD-88-418.
Default Order issued September 14, 1988.

Respondent was ordered to pay complainant, as reparation, $886.52, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

MANDIGO FARMS INC. v. KENDALL BULL.
PACA Docket No. RD-88-455.
Default Order issued September 28, 1988.

Respondent was ordered to pay complainant, as reparation, $2,886.10, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

AUSTIN J. MERKEL CO. INC. v. STAR BEAR PRODUCE INC.
PACA Docket No. RD-88-416.
Default Order issued September 14, 1988.

Respondent was ordered to pay complainant, as reparation, $3,200.75, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

ROBERT L. MEYER d/b/a MEYER TOMATOES v. V. F. LANASA INC.
PACA Docket No. RD-88-417.
Default Order issued September 14, 1988.

Respondent was ordered to pay complainant, as reparation, $8,057.50, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

MILLS DISTRIBUTING CO. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-422.
Default Order issued September 14, 1988.

Respondent was ordered to pay complainant, as reparation, $3,597.50, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

J.R. NORTON COMPANY v. LOI BRONX TERMINAL CORP.
PACA Docket No. RD-88-357.
Order issued September 28, 1988.

DENIAL OF MOTION TO REOPEN AFTER DEFAULT
(Summarized)

As respondent has not presented a good reason for reopening the default order, its motion to reopen is denied.

)SHITA MARKETING INC. v. BARRIE KELLNER, KARL KELLNER & IEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC RODUCE INC. d/b/a ATLANTIC PRODUCE.
ACA Docket No. RD-88-421.
)efault Order issued September 14, 1988.

Respondent was ordered to pay complainant, as reparation, $2,764.10, plus 3 percent interest per annum thereon from July 1, 1987, until paid.

ARAMOUNT PRODUCE INC. v. FRAMINGHAM FRUITLAND INC.
PACA Docket No. RD-88-404.
Default Order issued September 1, 1988.

Respondent was ordered to pay complainant, as reparation, $8,971.75, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

PETERSON FARMS v. GUSTAVO MARTINEZ d/b/a ROBERT'S SON PACKING.
PACA Docket No. RD-88-370.
Order issued September 21, 1988.

ORDER REOPENING AFTER DEFAULT
(Summarized)

Respondent's motion to reopen was filed within a reasonable time and that good reason has been shown why the relief requested in the motion should be granted.

Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

QUALITY FRUIT & PRODUCE CO. v. STEPHEN S. SMITH d/b/a SMITH PRODUCE.
PACA Docket No. RD-88-452.
Default Order issued September 28, 1988.

Respondent was ordered to pay complainant, as reparation, $13,149.50 plus 13 percent interest per annum thereon from November 1, 1987, until paid.

RIO FRESH INC. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-429.
Default Order issued September 15, 1988.

Respondent was ordered to pay complainant, as reparation, $1,500.00, plus 13 percent interest per annum thereon from May 1, 1987, until paid.

SALINAS LETTUCE FARMERS COOPERATIVE v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-423.
Default Order issued September 14, 1988.

Respondent was ordered to pay complainant, as reparation, $1,275.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

A. SAM & SONS PRODUCE INC. v. SAYLOR'S PRODUCE INC. FORMERLY: SAYLOR'S FRUIT MARKET.
PACA Docket No. RD-88-443.
Default Order issued September 28, 1988.

Respondent was ordered to pay complainant, as reparation, $12,200.35 plus 13 percent interest per annum thereon from October 1, 1987, until paid.

STANDARD FRUIT & VEGETABLE CO. INC. v. ROBERT L. DARBY AND RONALD J. DARBY d/b/a DARBY'S PRODUCE.
PACA Docket No. RD-88-438.
Default Order issued September 29, 1988.

Respondent was ordered to pay complainant, as reparation, $23,652.45 plus 13 percent interest per annum thereon from August 1, 1987, until paid.

SUN VALLEY PRODUCE INC. v. NINE-WAY PRODUCE CO.
PACA Docket No. RD-88-436.
Default Order issued September 29, 1988.

Respondent was ordered to pay complainant, as reparation, $11,130.64 plus 13 percent interest per annum thereon from December 1, 1987, until paid.

SUN WORLD INTERNATIONAL INC. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE a/k/a ATLANTIC PRODUCE INC.
PACA Docket No. RD-88-428.
Default Order issued September 15, 1988.

Respondent was ordered to pay complainant, as reparation, $563.50, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

HERESA'S BROKERAGE INC. v. EDD HOBBS JR. d/b/a HOBBS ARMS.
ACA Docket No. RD-88-402.
efault Order issued September 2, 1988.

Respondent was ordered to pay complainant, as reparation, $1,029.00, plus percent interest per annum thereon from July 1, 1987, until paid.

OMATO WORLD INC. v. VIC MAHNS INC.
ACA Docket No. RD-88-407.
efault Order issued September 1, 1988.

Respondent was ordered to pay complainant, as reparation, $3,796.80, plus percent interest per annum thereon from June 1, 1987, until paid.

TOMOOKA FARMS INC. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-426.
Default Order issued September 15, 1988.

Respondent was ordered to pay complainant, as reparation, $1,175.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

UCON PRODUCE INC. v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-433.
Default Order issued September 15, 1988.

Respondent was ordered to pay complainant, as reparation, $1,412.50, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

VEG-A-MIX v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-424.
Default Order issued September 14, 1988.

Respondent was ordered to pay complainant, as reparation, $9,105.45, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

JORDAN E. WILLARD & STANTON R. HOLTHOUSE d/b/a RUDY HOLTHOUSE SONS v. BARRIE KELLNER, KARL KELLNER & MEL WINICK d/b/a ATLANTIC PRODUCE and/or ATLANTIC PRODUCE INC. d/b/a ATLANTIC PRODUCE.
PACA Docket No. RD-88-427.
Default Order issued September 15, 1988.

Respondent was ordered to pay complainant, as reparation, $1,295.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

J.A. WOOD CO-VISTA INC. a/t/a J.A. WOOD CO. v. SKLARZ PRODUCE CO. INC.
PACA Docket No. RD-88-450.
Default Order issued September 29, 1988.

Respondent was ordered to pay complainant, as reparation, $6,998.50, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

YAKIMA FRUIT & COLD STORAGE CO. v. GREAT PLAINS BROKERAGE INC.
PACA Docket No. RD-88-400.
Default Order issued September 2, 1988.

Respondent was ordered to pay complainant, as reparation, $7,751.00, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

YAKIMA FRUIT & COLD STORAGE CO. v. ROY ENTERPRISES INC. a/t/a BUCK'S FRUIT CO.
PACA Docket No. RD-88-403.
Default Order issued September 1, 1988.

Respondent was ordered to pay complainant, as reparation, $3,055.00, plus 13 percent interest per annum thereon from January 1, 1987, until paid.

In re: CONTINENTAL AIRLINES, INC., and MICHAEL J. SOUSA.
P.Q. Docket No. 319.
Order filed September 12, 1988.

Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DISMISSAL OF COMPLAINT
AS TO MICHAEL J. SOUSA

The complaint against Michael J. Sousa is hereby dismissed as complainant has requested.

In re: ANTONIA ISABEL de DURAZO.
P.Q. Docket No. 341.
Decision and Order filed August 3, 1988.

Importation of fruit without a permit - Failure to file an answer.

Joseph Pembroke, for Complainant.
Respondent, pro se
Decision and Order issued by Paul Kane, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56-2(e)). The Office of the Hearing Clerk mailed to respondent, by certified mail, copies of the complaint and the Rules of Practice governing proceedings under the Act. This constitutes service under section 1.147(b)(3) of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), respondent was informed in the complaint and the letter of service that an answer should be filed within 20 days after service of the complaint, and that failure to file an answer would constitute an admission of the allegations in the complaint, under 7 C.F.R. § 1.136(c). The respondent was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

The respondent filed no answer during the 20-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)). Respondent's failure to file an

answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Antonia Isabel de Durazo, respondent, is an individual whose address is P.O. Box 364, Heber, California 92249.

2. On or about June 4, 1986, at Calexico, California, respondent imported two mangoes from Mexico into the United States in violation of 7 C.F.R. § 319.56-2(e), because the fruit was not accompanied by a permit, as required.

Conclusions

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

Order

Respondent Antonia Isabel de Durazo is hereby assessed a civil penalty of two hundred fifty dollars ($250), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to U.S. Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 100 North Sixth Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final September 15, 1988.--Editor.]

In re: VICTOR GABELA and AIRCRAFT SERVICES INTERNATIONAL, INC.
P.Q. Docket No. 229.
Decision and Order filed July 7, 1988.

Improper removal of foreign-origin garbage - Failure to appear at hearing.

Joseph Pembroke, for Complainant.
Respondent, pro se
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

On April 20, 1988, an Administrative Hearing was held in the GSA Conference Room 11104, Federal Building, 11000 Wilshire Boulevard, Los Angeles, California to determine if Victor Gabela had violated garbage regulations 7 C.F.R. § 330.400(b)(1) and 9 C.F.R. § 94.5(b)(1). The April 17, 1986, complaint issued by the Acting Administrator of the Animal and Plant Inspection Service alleged that Mr. Gabela violated the regulations by removing from Aero Mexico flight No. 494, five unused meals classified as foreign-origin garbage because such garbage was not removed in tight, leak-proof covered receptacles to an approved facility for incineration or sterilization, as required.

On May 4, 1986, Mr. Gabela filed an answer stating that he removed the foreign-origin garbage but that it was removed in a tight, leak-proof plastic bag. Mr. Gabela was properly served with the Complaint and Notice of Hearing in accordance with the Rules of Practice 7 C.F.R. § 1.147.

Despite receiving such service, Respondent Victor Gabela, nor any representative of Mr. Gabela's, appeared at the hearing. Mr. Gabela's failure to appear at the hearing after being properly served and duly notified constitutes a waiver of a right to future hearing and admission of any facts which may be presented at the hearing. Testimony taken at the hearing revealed that the foreign-origin garbage was not placed in a leak-proof container. In re: *Craig Landeen*, 45 Agriculture Decision 2006 (1986); 7 C.F.R. Section 1.141(e). Such failure by Respondent shall also constitute an admission of all the material allegations of the facts contained in the complaint.

Findings of Fact

1. Victor Gabela, hereinafter the Respondent, is an individual whose last known address is 5211 Clara Street, Cudahy, California 90201.

2. On or about November 15, 1985, at Los Angeles, California, Respondent removed from Aero Mexico Flight 494 five unused meals, i.e., foreign-origin garbage in violation of section 330.400(b)(1) of the regulations (7 C.F.R. § 330.400(b)(1)) and section 94.5 of the regulations (9 C.F.R. § 94.5(b)(1)), because the foreign-origin garbage was not removed in tight, leak-proof covered receptacles, as required.

Conclusions

By reason of the facts in the findings of fact set forth above, Respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent Victor Gabela is hereby assessed a civil penalty of five hundred dollars ($500). The Respondent shall send a certified check or money order payable to "The Treasurer of the United States" to United States Department of Agriculture, Animal and Plant Health Inspection Service Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, Minneapolis, Minnesota 55403.

The order shall be final and effective 35 days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final September 13, 1988.--Editor.]

In re: MATNANI FOODS CORPORATION.
P.Q. Docket No. 88-13.
Decision and Order filed July 27, 1988.

Importation of prohibited fruit - Failure to file an answer.

Jon Seward, for Complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act of February 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167), by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated section 319.56(c) of the regulations (7 C.F.R. § 319.56(c))

governing proceedings under the Act were served by certified mail on respondent by the Hearing Clerk on May 23, 1988.

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, that failure to deny, otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of the allegations in the complaint and waiver of hearing. The letter of service also advised respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver of an oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and has failed to request an oral hearing.

Respondent's failure to file an answer within the time prescribed by section 1.136(a) of the rules of practice (7 C.F.R. § 1.136(a)) constitutes an admission of the allegations in the complaint pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the rules of practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Matnani Foods Corporation, herein referred to as the respondent, is a corporation doing business at 617 S. Stanford Avenue, Los Angeles, California 90021.

2. On or about December 19, 1986, the respondent imported four hundred and fifty (450) boxes of sand pears into the United States at Los Angeles, California, from South Korea, in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because sand pears are prohibited entry under the regulations.

Conclusions

Respondent has failed to respond in the required manner to the allegations in the complaint. By reason of the Findings of Fact set forth above, respondent has violated the Act and the regulations issued under the Act. Therefore, the following Order is issued.

Order

Matnani Foods Corporation is hereby assessed a civil penalty of one thousand dollars ($1,000.00), which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be forwarded within thirty (30) days from the effective date of this Order to:

USDA, APHIS Field Servicing Office
Accounting Section, Butler Square West
5th Floor, 100 North 6th Street
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 88-13.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless respondent appeals to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R § 1.145).

[This decision and order became final September 7, 1988.-Editor.]

In re: PARADISE TROPICAL PRODUCE, INC.
P.Q. Docket No. 247.
Decision and Order filed July 19, 1988.

Importation of soursops without permit - Failure to file answer.

Cynthia Koch, for Complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, (Act) (7 U.S.C. §§ 151-164a and 167) and regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent had violated the Act and section 319.56-2(e) of the Code of Federal Regulations (7 C.F.R. §319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondent on May 7, 1986, by certified mail in conformity with section 1.147(b)(3) of the Rules of Practice (7 C.F.R. § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that respondent had twenty (20) days after receipt of the complaint to file an answer with the Hearing Clerk. Respondent was also informed that failure to file an answer to, or plead specifically to, any allegation in the complaint, would constitute an admission of such allegation. Additionally, respondent was informed that a failure to file an answer within the time allowed therefor would constitute an admission of the allegations in the complaint and a waiver of hearing. More than twenty (20) days have elapsed since respondent was served with the complaint. Respondent has not

filed an answer. Accordingly, under the plain provisions of the Rules of Practice, a default decision should be granted in this case. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Paradise Tropical Produce Inc., herein referred to as the respondent, is a business whose address is Store # 26, Bronx Terminal Market, Bronx, New York 10451.

2. On or about January 28, 1986, the respondent imported into the United States at John F. Kennedy International Airport, Jamaica, New York, from St. Vincent, West Indies, approximately five cartons of soursops in violation of section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)), because the soursops were not imported under permit, as required.

Conclusions

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent is hereby assessed a civil penalty of seven hundred and fifty dollars ($750.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North 6th Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R § 1.145).

[This decision and order became final September 13, 1988.--Editor.]

In re: HUMBERTO SALINAS.
P.Q. Docket No. 343.
Decision and Order filed July 21, 1988.

Importation of fruit without permit - Failure to file an answer.

Joseph Pembroke, for Complainant.
Respondent, pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complainant alleged that the respondent violated section 319.56-2(e) of the regulations promulgated thereunder (7 C.F.R. § 319.56-2(e)). The Office of the Hearing Clerk mailed to respondent, by certified mail, copies of the complaint and the Rules of Practice governing proceedings under the Act. This constitutes service under section 1.147(b)(3) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), respondent was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute an admission of the allegations in the complaint, under 7 C.F.R. § 1.136(c). The respondent was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136)(c) of the Rules of Practice (7 C.F.R. § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Humberto Salinas, respondent, is an individual whose address is P.O. Box 966, Laredo, Texas 78040.

2. On or about June 11, 1985, at Laredo, Texas, respondent imported limes from Mexico into the United States in violation of 7 C.F.R § 319.56-2(e), because the fruit was not accompanied by a permit, as required.

Conclusions

The respondent has failed to file an answer to any of the allegations in the complaint. The consequences of such a failure were explained to the

respondent in the complaint and in the letter of service that accompanied it. By his silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

Order

Respondent Humberto Salinas is hereby assessed a civil penalty of five hundred dollars ($500), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to U.S. Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 100 North Sixth Street, Minneapolis, Minnesota 55403 within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R § 1.145).

[This decision and order became final September 14, 1988.--Editor.]

CONSENT DECISIONS ISSUED SEPTEMBER 1988

(Not Published Herein.--Editor)

Horse Protection Act

MARY C. BAIRD AND ROLLIE BEARD. HPA Docket No. 88-29. Consent Decision as to Rollie Beard. September 23, 1988.

SAMMY DAY AND JOHN REID. HPA Docket No. 88-6. Consent Decision as to John Reid. September 9, 1988.

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SEALAND SERVICES, INC. P.Q. Docket No. 88-12. September 22, 1988.

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